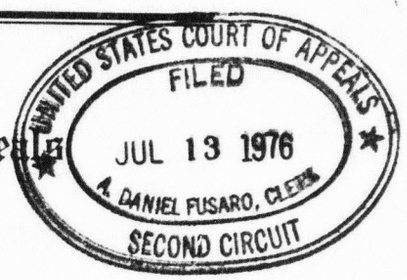
United States Court of Appeals

for the Second Circuit

APPENDIX

76-7050



United States Court of Appeals

FOR THE SECOND CIRCUIT

MARX & CO., INC., JOHN V. SUMMERLIN, JR., OTTO MARX, JR., WILLIAM D. FUGAZY and LOUIS V. FUGAZY,

Plaintiffs-Cross-Appellants,

—against—

THE DINERS' CLUB, INC., DINERS/FUGAZY TRAVEL, INC., THE CONTINENTAL CORPORATION and THE CONTINENTAL INSURANCE COMPANY,

Defendants-Cross-Appellees,

THE DINERS' CLUB, INC., DINERS/FUGAZY TRAVEL, INC.,

Defendants-Appellants,

—against—

WILLIAM D. FUGAZY, LOUIS V. FUGAZY, JOHN V. SUMMERLIN, JR., OTTO MARX, JR., MARX & CO., INC., and F. T. VENTURES, INC.,

Plaintiffs-Appellees

On Appeal from an Order and Judgment of the United States District Court for the Southern District of New York

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APPENDIX TO THE BRIEFS

[Volume III—Pages A-1081 to A-1668]

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PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

		Page
Civil Docket, United States District Court, 70 Civ. 3064		
I.	Documents from the Clerk's Index to the Record on Appeal	
32.	Opinion Of Judge Tyler denying Defendants' Motion to Dismiss upon condition that Plaintiffs file an Amended Complaint. Plaintiffs' Motion for Compliance with Discovery and Inspection was granted in part and denied in part.	A-1
33.	Second Amended Complaint.	A-14
46.	Defendants' Amended Answer.	A-25
67.	Plaintiffs' Answer to Defendants' Counterclaims.	A-39
68.	Answer of F. T. Ventures, Inc. to Defendants' Counterclaims.	A-42
93.	Answer to Third-Party Complaint by the Third-Party Defendants.	A-46
115.	Pre-Trial Order.	A-48
116.	Stipulation and Order amending Pre-Trial Order.	A-77
117.	Statement of Ultimate Issues in the Case.	A-79
118.	Defendants' Request to Charge.	A-85
126.	Plaintiffs' Trial Memorandum.	A-99
127.	Plaintiffs' Memorandum with respect to the Admissibility of Fugazy Travel Bureau, Inc. v. Ernst & Ernst, and Fugazy Travel Bureau, Inc. v. Tower Credit Corp.	A-145
	-and-	
	Exhibits to Plaintiffs' Memorandum (Bound Separately) (Excluding the deposition of William Fugazy in Fugazy v. Time, Inc.)	A-166

		Page
I.	Documents from the Clerk's Index to the Record on Appeal (Continued)	
134.	Defendants' Notice of Motion for Judgment Notwithstanding the Verdict or for a New Trial and Endorsed Decision.	A-232
137.	Affidavit of Barry Fredericks in Opposition to Defendants' Motion for Judgment NOV or New Trial.	A-297
138.	Memorandum on Behalf of Plaintiffs in Opposition to Defendants' Motion for Judgment NOV or a New Trial.	A-337
139.	Reply Affidavit of Joseph J. Santora.	A-377
145.	Opinion of Judge Ward.	A-403
148.	Plaintiffs' Notice of Motion Fixing the Date from Which Pre-Verdict Interest Should be Computed.	A-419
149	Memorandum in Support of Plaintiffs' Motion that Pre-Verdict Interest be computed from September 1, 1969.	A-425
153.	Affidavit in Support of Plaintiffs' Motion for Pre-Judgment Interest.	A-439
154.	Reply Memorandum in Support of Plaintiffs' Motion for Pre-Judgment Interest.	A-442
157.	Judge Ward's Opinion Regarding Pre-Judgment Interest.	A-456
158.	Counter Judgment.	A-464
160.	Notice of Appeal - February 4, 1976.	A-470
161.	Complaint.	A-472
168.	Defendants' Answer and Counterclaims.	A-482
171.	Plaintiffs' Answer to Counterclaims.	A-498
172.	Additional Defendants' Answer to Counterclaims.	A-500

Page

I. Documents from the Clerk's Index to the Record On Appeal (Continued)

176. Notice of Cross Appeal A-503

178. Civil Appeal Scheduling Order A-506

II. Exhibits

Plaintiffs' Exhibits:

4 A-508

5 A-513

6 A-564

7 A-618

13 A-628

22 A-645

22(a) A-649

26 A-657

27 A-661

28 A-663

29 A-665

30 A-666

31 A-729

34 A-755

36 A-765

39 A-773

40 A-780

41 A-781

42 A-783

43 A-784

48 A-785

55 A-799

Defendants' Exhibits:	Page
B	A-800
F	A-802
J	A-807
K	A-816
P	A-818
NN	A-819
PP	A-822
XX	A-826
YY	A-860
EEE	A-863
FFF	A-864
GGG	A-867
KKK	A-872
MMM	A-873
NNN	A-876
OOO	A-878
PPP	A-879
QQQ	A-881
RRR	A-884
SSS	A-885
TTT	A-886
UUU	A-887
VVV	A-888
WWW	A-889
AAAA	A-891
FFFF	A-893

Defendants' Exhibits:	Page
IIII	A-894
JJJJ	A-900
KKKK	A-901
LLLL	A-902
MMMM	A-903
WWWW	A-904

Defendants' Exhibits for identification:	
H	A-913
H-1	A-918
H-2	A-920
H-3	A-921
H-4	A-922
L	A-923

		Page
III.	Thirty-Sixth Annual Report of the S.E.C.	A-930
IV.	Excerpts from Trial Transcript	
	Pages	
	8-55	A-939
	57-58	A-987
	64-141	A-989
	160	A-1067
	197-209	A-1068
	239	A-1081
	255-262	A-1082
	286-318	A-1090
	335-336	A-1124
	346	A-1126
	352	A-1127
	355	A-1128
	360	A-1129
	368	A-1130
	377-415	A-1131
	419	A-1171
	432	A-1172
	472	A-1173
	496-499	A-1174
	508-511	A-1178
	555-561	A-1182
	567-568	A-1189
	573-579	A-1191
	583-585	A-1198
	594-595	A-1201
	603-605	A-1203

IV. Excerpts from Trial Transcript (Continued)

Pages	Page
615-616	A-1206
621-626	A-1208
636-642	A-1216
648-670	A-1223
696-703	A-1246
707-708	A-1254
710	A-1257
723-726	A-1258
732-748	A-1261-a
753-755	A-1278
760	A-1281
776-785	A-1282
791-796	A-1292-a
798-815	A-1297
855-856	A-1315
870-879	A-1317
901-926	A-1328
932-933	A-1355
952	A-1357
961-965	A-1358
980-982	A-1363
1113-1133	A-1366
1167-1175A	A-1387
1184-1186	A-1397
1211-1218	A-1400
1228-1230	A-1408

IV. Excerpts from Trial Transcript (Continued)

Pages	Page
1284	A-1411
1291-1292	A-1412
1301-1303	A-1414
1324-1325	A-1417
1360	A-1419
1443	A-1420
1453	A-1421
1460-1472	A-1422
1490-1497	A-1435
1507	A-1443
1513-1514	A-1444
1519-1533	A-1446
1542	A-1461
1549	A-1462
1551-1553	A-1463
1685-1716A	A-1466
1722-1799	A-1499
1807-1836	A-1581
1883	A-1612
1938-1985	A-1613
2007-2014	A-1661
416-418	A-1669
719-722	A-1672
946-958	A-1676
711-713	A-1690

THE COURT: Let me ask him that then.

Did you have disucssions with any person in 1966 or '67 relative to the sale of your company?

THE WITNESS: There are none that I can recall although some how I feel there may have been. I am sorry, but I just can't think of it.

Q I believe you mentioned yesterday that the talks with Diners' Club in '67 commenced in June 1967; is that your recollection?

A That's my recollection.

Q I have a note here that says June 21st was the date that you set or thatyou could remember or that your diary indicated that they started; is that correct?

A Yes.

Q I think you indicated yesterday that you got that from the diary and not from your recollection; is that it?

A I got it from my recollection, and then I verified the actual date from my diary.

Q When is the first time that you looked atthat diary after June 21, 1967, that you recall?

A You will have to repeat thatquestion.

THE COURT: Yes, Mr. Reporter, please.

(Question read.)

MR FREDERICKS: Your Honor, I really don't think

I think on the 23rd, I think Mr. Bloomingdale called me before I went out to the Coast, and we talked on the phone, but the next we met was when we went to the Coast July 6th, I think, or july 7th. We never met physically before that but we may have talked on the phone.

Q Did Mr. Bloomingdale, when he spoke to you, mention at all anything about the talks thathe had been having in 1967?

A No.

Q Did he say at all why he was interested in the company in 1967?

A When I went out tothe Coast, I think I testified that he was very, very ecstatic in his praise of what had happened to our company, and why he wanted to buy it, and why Continental told him to go out and buy it.

Q What exactly had happened? I know you mentioned you had a decision in a CAB case. Did anything else happen to change your company from what it was in 1965?

A Yes, we had launched or we had been into a most successful franchise program for a year and the only successful franchise program in the industry. We had launched it, opened up the offices, and received the approvals from the industry saying that it was a proper and authorized type of operation, which no one else had ever been able to

do, by the way.

THE COURT: Under what name did you launch this franchise program?

THE WITNESS: We launched it under the name of Fugazy Travel Bureau, your hOnor.

THE COURT: You sold franchises in different places so that people could operate in these places under the Fugazy name?

THE WITNESS: Yes, your Honor. We sold ten or fifteen; I am not sure of the number at that time.

Q You say Mr. Bloomingdale was impressed by that franchise operation?

A I would say that was the single most important thing, but also our -- the commercial victory that we won with the CAB was a big thing, and he liked that.

Q You don't know when that was though, do you?

A I can't answer you. Excuse me, I have to explain one thing to you, without boring anyone. It was a shallow victory, and let me tell you why. After we won it, the airlines went and lowered the commissions so that it didn't pay you to do what we won, but since then things have changed, but I mean at least we had -- we made some lawyers rich for a while.

Q Mr. Fugazy, I am trying to find out what it was

he was interested in. You mentioned the franchise business in 1967. You mentioned you won a victory. Do you recall that that was part of your 1967 discussions with Mr. Bloomingdale, the CAB victory? Was that involved at all?

A. I think Mr. Bloomingdale's biggest interest -- I don't want to sound egotistical to say this but probably was me. At least that's what he said.

Q. When did he say that?

A. Well, he said it all along, because he said in the negotiations, unless Marx would permit me to become involved, thathe wouldn't conclude the deal. He then tied me up to a 15-year contract; they took out a five million dollar insurance policy on my life, so I had to feel they had some fondness for me.

Q. Who did that?

A. Mr. Bloomingdale and Diners' Club.

Q. Took out a five million dollar policy on your life?

A. Something around that figure. There were several different policies but several anyway.

Q. How big a policy did Otto Marx have on your life in 1966?

A. It was a pretty good size.

Q. About a million, wasn't it?

A. I think it was more than that. I don't know.

Q. Maybe it was more than that?

A. I don't know.

Q. Why washe concerned with that big a policy on your life, if you know?

A. Maybe he thought he'd get lucky and I'd get hit with something. I don't know.

Q. Did he think you owed him a lot of money at that time?

A. I don't know. I would not like to think Mr. Marx thought that way or does to this day. We have been friends a long time.

Q. No, Mr. Fugazy, I am serious and I wish you would follow me, please.

A. I am sorry, I am trying to.

Q. Did Mr. Marx have a fairly large debt coming tohim from you in 1966?

A. From me? Nothing. I dodn't owe him a penny.

Q. Who owed him, Fugazy Travel?

A. He owned the company so they owed it to him. I didn't owe Mr. Marx a penny. I wish I could say that today.

Q. Mr. Fugazy, I want you to focus on this, and I want to be a little serious. You were the president of

Fugazy Travel in 1966, weren't you?

A. Yes, sir.

Q. You know who the company owed money to in 1966, didn't you?

A. It had owed money to Mr. Marx.

Q. It owed quite a bit of money to Mr. Marx, didn't it?

A. Mr. Marx had bought the company and by buying it created an indebtedness whichmeans the company owed him money, yes.

Q. Didn't Mr. Marx, after the time thathe bought it, put in loans as well, specific loans to fund the company?

A. He financed the company.

Q. That's right, that is what I am talking about.

A. Excuse me, I don't think he did it directly. He caused companies to finance it.

Q. I know that he used other corporations, but let's say when I say Mr. Marx I am talking about whatever corporate vehicle of the moment he happens to use. You understand that?

A. I don't accept that.

Q. Youare talking about a company called Travel Credit?

A. Mr. Marx's basic company is Marx & Co.,

a very old established firm.

Q Mr. Fugazy, after Mr. Marx bought the company in 1963, I am not talking about what he paid for the purchase price, I am talking about after that, did he loan money to the company?

A Which company?

Q Fugazy Travel, the company that you sold to Diners'.

A I don't think he did, no.

Q All right. Did anybody at Mr. Marx's direction loan money to Fugazy Travel?

A I think the Bankers Trust did. I think at the time we owed Bankers Trust a million five which Diners' took over. I am sorry, you know, Mr. Marx handled the finances. I knew about it but I would have to say that Mr. Marx personally to the best of my knowledge did not loan money directly to the company. I could be wrong. I haveno recollection.

Q Was the money loaned by banks at Mr. Marx's personal guaranty, if you know?

THE COURT: For example, this million five which you testified was owed Bankers Trust.

THE WITNESS: Yes, your Honor, this was the purchase price that Otto Marx had paid to buy the company from Tower,

and as a result had caused loans or indebtedness from the company to other corporations or to banks. My only point is I don't think Otto Marx personally wrote a check out from Otto Marx to Fugazy, and I know that I owed no money at that time to Otto Marx myself.

THE COURT: Personally?

THE WITNESS: Personally. When I say Fugazy, my name happened to be on the firm, but I didn't use it.

THE COURT: The corporation, you have indicated, if I understand your testimony correctly. owed money to Mr. Marx in 1966 and 1967?

THE WITNESS: Yes, sir, and he had an insurance policy on my life which was the key-man insurance, and so did Diners'. Diners' took out a bigger one.

THE COURT: Mr. Santora has asked you relative to the approximately million five hundred thousand dollars which Fugazy Travel apparently owed the Bankers Trust in 1967, whether or not Mr. Marx personally guaranteed the loan which was outstanding from Bankers Trust to Fugazy Travel.

THE WITNESS: I don't know that, your Honor.

Q Was there anybody else at Fugazy Travel who had any moreknowledge of that transaction at that time, the one million five?

A Otto.

Q Other than Mr. Marx. How about your brother Louis?

A He may. I doubt it. He may. I can't answer.

Q Do you remember when it was that Mr.Marx took out the million dollars life insurance policy on your life?

A I think right after he bought the company.

Q 1963?

A You know, I am going to be inaccurate, Mr. -- because I just don't know.

Q I am saying to you he bought the company in 1963. Use that as a benchmark. Do you have any idea how long it was?

A I think almost immediately. In fact, when he was negotiating to buy the company he said, "Bill, I am buying this company principally because of you, and if, God forbid, something happened to you, I'd like to have you be -- I'd like you to be insured," I said, "God forbid," too, but I got insured.

Q You didn't have any objection to that?

A None whatsoever. The man had a risk. The man was putting up his money to --

Q Now --

A I had no objection when Diners' took out a five million dollar or a three million -- I had no objection.

MR. SANTORA: I move to strike that.

THE COURT: It was not responsive to any question, and for that reason I will strike it. The jruy will disregard the last portion of the answer as not responsive to the last question.

Q Now, you mentioned, Mr. Fugazy, that Mr. Bloomingdale said he was interested in your services, your personal services, in 1967. I would like to read to you from your deposition, the same one that you saw previously, which is marked Defendants' Exhibit A for identification, page 54, lines 11 and 12, actually beginning at line 11, where you said in answer to the question of Mr. Marx's counsel:

"Bloomingdale made it a point that the main thing they were interested in acquiring our company for was me. In fact, the purchase agreement of Fugazy, if you read it, would appear like they were purchasing me, because of the restrictions and so forth."

Did Mr. Bloomingdale -- do you recall giving that

* * * * *

Marx & Co., Inc., et al.

v. 72 Civ. 4324

The Diners' Club, Inc., etc.

New York, New York

May 8, 1975
9:45 a.m.

(Trial resumed.)

- - -

(In open court; jury present.)

THE COURT: Good morning, ladies and gentlemen. Good morning every one.

W I L L I A M D E N I S F U G A Z Y, resumed.

THE COURT: You understand that you will be continuing your examination today under the same oath which was administered when you first took the stand.

A Yes, your Honor.

THE COURT: Mr. Santora.

CROSS EXAMINATION (CONTINUED)

BY MR. SANTORA:

Q Mr. Fugazy, summing up part of your testimony on direct yesterday, I would like to ask you if you are claiming in this case that Diners' Club failed to use their best efforts to make effective a registration statement for your

Diners' Club stock in 1969?

A Yes.

Q Is that also --

A Excuse me. What year?

Q 1969.

A Yes, sir.

Q Does that also apply to the Diners' Club shares of Mr. Marx and Louis Fugazy and Mr. Summerlin?

A I don't know that I can answer for them, I believe it is the same.

MR. SANTORA: Your Honor, I would like to read a portion of the agreement, purchase agreement, which is Plaintiffs' Exhibit f.

THE COURT: It is in evidence. I believe a portion was read yesterday. I indicated at that time at such time as you wished to read from that exhibit you might do so.

MR. SANTORA: All right. I would like to pick up in that Exhibit 5, Plaintiffs' Exhibit 5, which is the 1967 purchase agreement, in paragraph 10.2(b) that Mr. Fredericks was reading from yesterday.

I would like to pick up in that paragraph where Mr. Fredericks left off, the next sentence, which is "Anything to the contrary notwithstanding, Diners' need not file any such registration statement until it may lawfully

use its regularly prepared fiscal year end financial statements as a part of such registration statement."

Q Mr. Fugazy, you have before you Plaintiffs' Exhibit 30; is that correct?

A Yes, sir.

Q Now --

THE COURT: Just so it is clear, that is the so-called S-1 or registration statement, ladies and gentlemen.

Q In fact, Mr. Fugazy, is that the same registration statement that you are complaining was not filed with the Diners' Club best efforts?

MR. FREDERICKS: I object to the form of that question, your Honor.

THE COURT: Yes. I think a form objection lies, and I will permit inquiry in the area. I think it is relevant to the case.

Q Mr. Fugazy, is that the registration statement you were referring to yesterday in answer to Mr. Fredericks' questions?

A I believe it is.

Q Do you recall saying yesterday that this statement was filed on August 28, 1969?

MR. FREDERICKS: I will object to that, your

Honor. There is no testimony.

I just introduced the document and read the date off thedocument myself. The witness was never questioned about the document.

THE COURT: Let's ask the witness the initial question.

Do you know when the registration statement was filed?

THE WITNESS: No, sir, I don't. I know approximately, your Honor. I think I said yesterday I thought it was filed the end of June, but I don't know.

Q Mr. Fugazy, would you please look at the signature page of the registration statement, which is Roman numeral II, page 11.

A Yes.

Q Do you see a conformed reference to your signature, Mr. William D. Fugazy as a director of Diners' Club?

A I see all the board signed it and I was one of them yes.

Q Do you recall that you signed this document, Mr. Fugazy?

A No, sir, I don't recall.

Q Youdon't recall one way or the other?

A No, sir, I don't.

Q Would you please turn to page 35 --

A Yes, sir.

Q -- which is entitled "Report of Independent Certified Public Accountants."

A Yes, sir.

Q You see the footnote in the lower left-hand corner which reads, "June 6, 1969 (except as to notes 11 and 13 the date of which is July 18, 1969")?

MR. FREDERICKS: I object to the form of the question, your Honor. I show the Court. There is no footnote on that page.

THE COURT: All right. Let me hear the question now that I have the document in front of me and I will rule on the question before you have to answer it one way or the other.

Mr. Reporter, please.

(Question read.)

THE COURT: You will have to go back because this has been handed to me at page 35. There is no footnote on that page. I think there was a reference to some Roman numeral at some point.

MR. FREDERICKS: That was exactly my objection, your Honor. It was at page 35 and I don't see any footnote.

MR. SANTORA: I am talking about the legend in the lower corner.

THE COURT: I see. I look at a footnote somewhat differently.

Perhpas if you would use the word legend or writing in the lower left-hand corner, it would cure the objection.

MR. SANTORA: Surely.

Q Do you see the legend, Mr. Fugazy, in the lower left-hand corner that says, "June 6, 1969 (except as to notes 11 and 13, the date of which is July 18, 1969)"?

A Yes, sir.

Q Does this indicate to you, Mr. Fugazy, that Diners' Club received its completed financials, its year-end financials, on July 18, 1969?

A I don't know. I wasn't the financial officer at Diners'. I don't know.

Q Have you ever heard before today when the year-end financials in 1969 were received by Diners' Club?

A I just don't know.

Q In trying to find out about the date that the registration statement was filed and when it was going to become effective, did youmake any inquiries as to when the financials arrived at Diners' so that they could proceed to

file the registration statement?

A No, I wasn't involved in that.

Mr. Marx was handling that. I was --

MR. SANTORA: I move to strike that as not responsive, everything after "no".

THE COURT: Yes. You don't know?

THE WITNESS: I don't know.

THE COURT: He doesn't know.

The jury will disregard anything else.

Q Now, at the left-hand corner of page 35, do you see Note 11?

I ask you, Mr. Fugazy, to turn in this registration statement, Plaintiffs' Exhibit 30--

THE COURT: Do you have another one of these, sir, because I would like to have one up here, and I would like counsel to have one as well.

All right. I will listen, then, but I think counsel should have it rather than the Court.

A Turn where?

Q Turn to page 43, which contains note 11, as you see, which is previously referred to as completed on July 18, 1969.

A Right.

Q Will you just for a moment read note 11 to yourself?

MR. FREDERICKS: Your Honor, I am going to have to object to statements of counsel.

THE COURT: Statements of counsel are not evidence, and I will direct the jury to that effect. The evidence is what comes from the mouths of the witnesses, from the depositions and from the exhibits which are in evidence.

That exhibit, which is Plaintiffs' Exhibit 30,

is in evidence, and to the extent it speaks through printed words it speaks for itself.

Q. Mr. Fugazy, have you had a chance to look at note 11 on page 43?

A Yes, sir; I have.

Q And do you see a reference to a $81 million lawsuit against DQM Corporation and Diners'/Fugazy Travel and various other subsidiaries of Diners', involving the Queen Mary?

A Yes; I do.

Q Are you familiar with that lawsuit?

A Yes; I am.

Q By the way, Mr. Fugazy, was the Queen Mary purchase the first act you performed for Diners' Club in '67?

A Diners' never purchased the Queen Mary.

Q Well, who did purchase it, Mr. Fugazy?

A The City of Long Beach.

Q And how did DQM and DFT fit into that?

A Well, I went over and arranged for Fugazy Travel Bureau to be the agent to book the Queen Mary, and we did so well Long Beach asked us, would we continue to be associated with them.

Then Bloomingdale asked me if I could get the

Diners' Club to become the master leaseholders, so Diners' Club--Diners'/Fugazy had no involvement with the Queen Mary after the cruise other than the fact that I personally was called upon to settle the lawsuit and to set up the partnership between American Airlines.

Diners'/Fugazy had no involvement, received no funds from it nor no benefit at all.

Q Did you ever discuss with anyone the question of whether or not the lawsuit and the note involved in this lawsuit about the Queen Mary was holding up these financials in the year 1969 prior to the filing of the registration statement?

A No. I wasn't involved in it, Mr. Santora. I wasn't involved at all.

THE COURT: The answer is no?

THE WITNESS: No, your Honor. I am not trying to be evasive. I don't understand--I think he's on the wrong wave length with me, because I'm not understanding.

THE COURT: You are not receiving whatever he is sending. All right. Next question.

MR. TOLAN: Your Honor, may we have a side bar?

(At the side bar.)

MR. TOLAN: Your Honor, I want to show you the

annual report for the year ending June 6th. That is in evidence. It went out to the shareholders along with the proxy statement in June 1967.

THE COURT: Could I then see these two footnotes to which reference has been made?

MR. TOLAN: Yes. Mr. Santora is misleading the witness.

MR. SANTORA: I object to that.

MR. TOLAN: The fact of the matter is, you are impeaching your own company's financial statements for the year end 1967.

Now, if you want to continue and do that, be my guest.

MR. SANTORA: I might point out to you--

THE COURT: Just a moment. Stay with me a moment.

It would appear that the second paragraph of footnote 11, as it appears on Plaintiffs' Exhibit 30, is different from the second paragraph of the footnote 11 which went to the stockholders, because on Plaintiffs' Exhibit 31, the annual report, the second paragraph of footnote 11 indicates a lawsuit is pending against Diners' Financial.

There is an indication of a jury verdict in

favor of the plaintiff in May, apparently, in the amount of $850,000, and presently pending before the Court motions to dismiss the action and set aside the verdict, and there is an opinion of counsel.

MR. TOLAN: That's correct. If you look at the preceding paragraph, which is the subject of the examination of Mr. Fugazy about the lawsuit--

MR. SANTORA: I don't know what you are talking about, about disclosure. It has nothing to do with disclosure.

THE COURT: I see your point. I am not a proofreader of any great note, but looking quickly, the first paragraph of footnote 11 of the two documents appears to be the same.

However, I would suggest that the second paragraph--now, I have just finished referring to a footnote which speaks as of--it would seem--May or the end of May, beginning of June 1967, a jury verdict and a very positive comment about motions pending to set aside this verdict.

I do know that footnote 11 in the S-1, Plaintiffs' Exhibit 30, indicates that in June, which would be a later bit of information, judgment was entered in favor of the plaintiff in an amount in excess of $1 million, that a notice of appeal has been filed.

MR. TOLAN: Yes.

THE COURT: And the like. So I would suggest that the footnote in the S-1 is an updated one, to my way of thinking, a rather important update of the prior footnote.

If they were identical, I would see a point to your argument. I recognize that you have stated in the first paragraph--

MR. SANTORA: May I be heard, Mr. Tolan? In the first place, I don't know what is in your mind, but I have been providing this for something different from what you have in mind. It has nothing to do with that. There is no question that this statement as taken is correct. It is a statement of your exhibit in evidence, signed by this witness, and I am asking him about the dates which appear in there.

Now, you interrupted me and brought in another thing, and you are trying to make some point which I don't quite understand at this moment.

MR. TOLAN: I am just suggesting to the Court--

MR. SANTORA: Are you suggesting to me that anything in that exhibit is incorrect?

MR. TOLAN: I am suggesting to you--

THE COURT: One at a time, gentlemen.

A-1103

MR. TOLAN: I am suggesting to you that you have read to the jury, which Mr. Fredericks read in, about the use of the financial statements certified by the accountants for the year ending 1969, and what I am suggesting to you, sir, is that if you take a look at the annual report there are certified financial statements for the year end 1967, certified by Touche, Ross, which was put out by the company in June of 1969.

MR. SANTORA: I am sorry about that. That is a matter for you to raise on redirect. It has nothing to do with what I am asking the witness.

MR. FREDERICKS: We will withdraw the objection.

MR. TOLAN: I am sorry, your Honor.

THE COURT: All right. Give back to whoever gave these exhibits--I guess I will give them to you, Mr. Tolan.

(In open Court.)

THE COURT: I am not sure there is a question pending. If you want it read back, you may.

(Record read.)

BY MR. SANTORA (Continuing):

Q Now, at some point, regardless of the date, you know that this registration statement was filed with the Securities and Exchange Commission, do you not?

A I know it was filed. I don't know the date, Mr. Santora.

Q After it was filed, do you know what if anything happened?

A Not that I can recall, Mr. Santora. I can't recall, I mean, what happened.

Q Well, do you know if there was any comment or request for new or additional information from the Securities and Exchange Commission affecting that registration statement?

A Yes. I recall that.

Q And did you see any letters from the SEC in respect of that registration statement?

A I may have. I don't recall any.

Q Well, try to test your memory, Mr. Fugazy. Let me ask you if you had any discussions with anybody at Diners' Club concerning whether or not this statement was being held up by the United States Securities and Exchange Commission.

A I wasn't president. I mean, so I would have no reason to be involved in it. I was on the board and a president of a subsidiary. I wasn't involved at all.

Q You had absolutely no involvement in this registration statement?

A Other than signing it, as all the other directors did.

Q And you never participated in any meetings or discussions concerning either the SEC's comments or what Diners' might have to do to meet the SEC's requirements to get this thing filed as you and Mr. Marx wanted?

A Other than--

MR. FREDERICKS: Your Honor, I am going to object to the form of that question.

THE COURT: Sustained. Another question on the same subject would be permitted.

Q Mr. Fugazy, do you recall having participated in any discussion with anybody at Diners' concerning the efforts of Diners' Club to meet the requirements of the SEC with respect to this registration statement?

A Yes.

Q And with whom did you discuss it?

A The board of directors.

Q Well, who, particularly, Mr. Fugazy?

A The whole board. I think it was on our agenda at two or three board meetings on a review of the pending SEC--excuse me--a review of the pending registration before the SEC.

Q Well, you now recall that you were involved to

the extent of having discussions with the other board of directors members?

A I have said that all along.

Q Do you recall the substance of any of the discussions concerning what the SEC wanted Diners' to do to get the statement effective?

A I recall that there was some problems about the Queen Mary suit. I recall there was some problems about Diners' had never written off any of its good will over the years, and the SEC was demanding that they write it off in compliance with the--the financial--the accountants' new regulation on so many years to write off good will.

There was some problem on the franchise income. They were questioning the method by which Diners' were treating franchise income, both from Diners' corporate income from its foreign franchises as well as the Diners'/Fugazy Travel franchise, and there were several other things.

I think our reserves on bad debts were seriously questioned. I--basically, that's it. And I think--excuse me--Reservations World, which was deferred, and which I later sold to American Airlines for them, was questioned.

Q So you recall that all these matters that you discussed were problems that the SEC raised, that had

to be cured before this registration statement could become effective?

A Excuse me. I don't know that I said the SEC raised them. I know that I recall at board meetings that these topics were discussed as being problem areas in a registration.

Whether the SEC raised them or whether we felt they were problems is something I can't testify to.

Q All right. Well, Mr. Fugazy, do you remember anybody from Diners' going to Washington to meet with the SEC to try to resolve some of these matters?

A No; I don't.

Q Now, during the time you were having these discussions with the other members of the board of directors, did it appear to you that Diners' and the people at Diners' were trying to comply with the SEC request?

MR. FREDERICKS: I am going to object to the question, your Honor.

THE COURT: If you know.

A I've got to say no.

THE WITNESS: If I may answer that, your Honor --your Honor, excuse me--may I say no with an explanation?

THE COURT: Well, I think it is up to counsel who is examining.

Q Well, I asked you if Diners' was trying, and you wanted to give an explanation.

A Yes, I know, and no, they weren't trying.

Q I am sorry. Would you repeat that?

A Yes. I know what was going on, but, no, they were not really trying.

Q What led you to believe that they were not really trying?

A Well, George Faunce and Al Bloomingdale kept bugging me to tell them to get Marx off their back on this registration and that they didn't want to have a registration at this time.

There were too many embarrassing problems, like the Queen Mary, like Reservations World, like the fact that Continental was sued along with Diners' on the Queen Mary lawsuit, and they felt that the Continental--I hate to mention this again, but the Continental takeover was going to come soon and that would cure--

MR. SANTORA: I will move to strike that unless the witness wants to say who said what to whom.

THE WITNESS: I'll tell you.

THE COURT: All right. Please tell us.

THE WITNESS: George Faunce said--in fact, he took me to lunch one day and said, "Can't you get

Otto Marx to back off of this registration?"

And I said, "Well, George, how can we? We've got to get the stock registered. It's worthless." And I said, "And Otto is just--feels that it has to be done."

He said, "Well, you know, the Continental take-over"--

I said, "George, if I tell Otto Marx about a Continental takeover again he's going to throw me out of the window."

He said, "Well, something's got to give, because we've got to be taken over by Continental, because the banks won't renew our loans, and everything like that."

I did go to Otto Marx and ask Otto if he would consider listening to them, and Otto was very adamant.

Q This is at the time that the registration statement was being discussed at the SEC, if you know?

A I'm sure it was--or maybe it was before--this was a--there was a long delay before they filed, because they were having serious problems, problems getting the year-end figures completed.

I think we were even late in our annual meeting that year. I could be wrong on that but--

THE COURT: When was this conversation to which you have just made reference?

THE WITNESS: It was in 1970--Otto Marx, if I --Otto Marx, as I recall from the documents yesterday, your Honor, around April, requested the stock be registered, and I know--

THE COURT: Well, let's go back.

You have just said--and I heard you say it--1970. The request, as I recall--

THE WITNESS: '69. I'm sorry.

THE COURT: The request was in '69?

THE WITNESS: Excuse me, your Honor. The tender came in 1970. I'm sorry. In 1969, Otto Marx, around April, requested that the--that our stock be registered.

This was a subject of several board meetings. In fact, I asked the board if I should leave, since I was part of it, and they said no. There was a problem in getting the registration started, because there was a lot of problems that year with this big lawsuit by City of Long Beach against Continental, the Queen Mary, Diners' Club. They named everybody. American Airlines, me, everybody.

There was a serious problem involved with Reservations World, because it had been deferred on the books, and most people felt it was worthless. There were

serious problems on the Diners' reserves on their receivables, which later on added millions of more write-offs, and the board and Faunce--poor Faunce went in as president and had all these problems--felt that it was an added burden, was there some way Otto Marx could delay it, or wouldn't insist that it be done this quickly, and that was the occasion for him taking me to lunch.

I think it was Mr. Faunce and either--I don't know whether it was Mr. Asch or someone else, but they both talked to me about it, and I referred them back to Otto.

THE COURT: When was this?

THE WITNESS: Right after Otto Marx requested the registration. It was April or May or June, around that time, your Honor, before they actually took steps to file for a registration.

THE COURT: Did they tell you that if they did take steps to file, that this information would become public information, and the price of the Diners' Club stock on the market would go down?

Did they tell you that this adverse information, if made public at the time, would drive the stock down?

THE WITNESS: No, your Honor. They didn't tell me that.

Q Some of those problems you mentioned, Mr. Fugazy, were they concerning some of the operations of Diners/Fugazy Travel?

A No -- excuse me. Just the franchise, yes. The franchise income.

Q That was under Diners/Fugazy Travel?

A Yes.

THE COURT: He said that.

Q This is 1969. Who was the president of Diners/Fugazy Travel?

A I was.

Q We know that this statement didn't get filed -- I am sorry -- did not become effective, it was filed. It never became effective, Mr. Fugazy.

Do you know what finally happened to stop the attempts to register it?

A Continental tendered for the stock.

Q I see.

That was February 1970.

Do you know of anything happening before February 1970 to stop the efforts to register the stock?

A I can't recall.

Q Do you know if Diners' withdrew the registration statement?

A It may have.

Q Mr. Fugazy, do you recall whether you and Mr. Marx asked Diners' to withdraw the statement?

A I may have. I don't recall it.

Q You are saying here today that you may have asked them to withdraw that statement?

A I don't know. You say you did. I don't know why I would ask them to. We wanted to get our stock registered. If I did, there must have been a reason. I just don't know.

Q I am not saying anything, Mr. Fugazy. I am just asking you questions.

A I am saying I don't recall.

Q I understand. You are also here claiming they didn't use their best efforts to get that statement effective. I am asking you now: Are you telling us that you don't know whether or not you asked them to stop the registration process?

A I certainly don't think we stopped them between the time Mr. Marx asked us in April until they filed it. Whether later on it was such a futile effort they couldn't get itthrough, whether Otto Marx and I agreed, I don't know. I don't recall that.

Q To sum up, Mr. Fugazy, during the time that you

were discussing this thing with the board of directors about the SEC and you were having some meetings, you say you didn't think Diners' was trying to get this thing registered, become effective?

A I don't want to say that the board wasn't. Let me get that straight.

Q Tell me who you think was trying and who was not.

A I don't think anyone purposely was trying not to. Faunce impressed upon me they had serious problems and that they were having trouble with the SEC, that Flug and I think Asch were involved in it; could I get Otto Marx to be patient on the thing.

I don't think it was -- that the board was trying to do something improper really. I would have known of it if they were.

Q Is that your feeling now, you don't know whether they were or they weren't?

A I think that individual officers of the company were trying to delay the registration. They didn't tell the board that or, if they did, they told it to them when I wasn't there. But the board certainly was not saying. let's not get this registration through. At least I never heard anyone say that other than people like George Faunce. In fact, really it was George Faunce that was primarily

involved in this effort.

Q Mr. Fugazy, we are here in a lawsuit where you have a claim. I don't think we should use terms like board of directors and corporation.

Could you tell me one person at Diners' Club who was involved in this registration statement that was trying to stop it from becoming effective?

THE COURT: Let us ignore the preliminaries that counsel set forth. Start the question with, can you tell me the name of any one person and follow through.

Mr. Reporter, would you read that portion of the pending question to the witness and if he can answer it, he will.

(Question read.)

A Mr. Faunce, Mr. Johnson talked to me about it, I just recall now.

MR. SANTORA: Your Honor, this is not people talking to him. I asked him about people who were not using their efforts to get it. He's got Johnson in, who is not part of Diners' Club.

THE WITNESS: He is on the board.

Q Johnson is one of them.

THE COURT: He says that Faunce and Johnson tried to prevent the registration from becoming effective.

Can you tell us what, if anything, either of those gentlemen did or said to prevent the registration from becoming effective?

A Yes, sir. I recall one meeting with Mr. Faunce and one phone call conversation with Mr. Johnson.

Mr. Faunce said to me, we are having serious problems with the SEC and getting Otto's and your brother's and your stock registered.

He gave me plausible reasons, your Honor. He said, We got this $80 million lawsuit against Continental and Diners' Club by the City of Long Beach which you are working on to help us get it settled, we have got the problem of the franchise income, we have got the problems of the reserves on the receivables which we are not sure about, we have got the problems of this reservations world, which if we can get it sold in the next month or so -- I was doing the negotiations and sold the company to American Airlines for them. He said, if we get these things done, we can get the registration finished, but we have problems. Would you talk to Otto.

I said I would.

Harold Johnson called me and I think he -- Harold indicated that he had lunch with Otto Marx, he and Otto were good friends.

He said, Bill, we have problems, as you know, with this registration and if you could talk to Otto to see if we could delay it or do something.

And I said listen, if I can help I will.

Again I explained what our position was. Otto and I were watching our stock go down and we couldn't sell the stock and we were losing money and I explained to him our position.

I think that's the only two people.

THE COURT: You were anxious, of course, at that time to get rid of your stock before it went down further?

A Sure was.

THE COURT: And all these problems which were mentioned with financial problems, were they not?

THE WITNESS: Serious problems, your Honor.

THE COURT: Serious financial problems which would have effected the value of Diners' Club stock, is that right.

THE WITNESS: Yes, your Honor.

MR. SANTORA: Your Honor, I would like to read for the record from this witness' deposition in this case dated November 11, 1971, the wtiness' testimony under oath which appears at page 166, line 5 through 168, line 25 as follows --

gabr 7 W.Fugazy-cross

MR. FREDERICKS: Your Honor --

THE COURT: Let counsel get the transcript. As a matter of fact, if you do have another copy, this is something I would like to have in front of me. If you don't have it, I am not going to delay the trial to get it.

You don't have it?

MR.SANTORA: I am sorry.

THE COURT: All right.

MR. TOLAN: What page is this, your Honor?

THE COURT: Page and line.

MR. SANTORA: Page 166, line 5 through page 168, line 25.

Do you have it?

MR. TOLAN: Just a second.

(Pause.)

MR. TOLAN: Your Honor, we will give you our copy.

MR. FREDERICKS: We have read it. We will make it available to the Court (handing).

THE COURT: Thank you.

MR. SANTORA: I appreciate that, too, your Honor.

THE COURT: You may proceed.

Q 166, line 5.

A Excuse me. I don't have one if you

want me to read it.

THE COURT: He is going to read it aloud.

Q These are the questions addressed to you and these are your answers, Mr. Fugazy.

"Q Did Mr. Asch ever discuss with you any comments received from the SEC concerning the financial statements of the Diners' Club, Inc. filed with the registration statement?

"A Yes, we had several meetings on it.

"Q Who was present at these meetings?

"A Everyone, Flug had made a trip down there to talk it over with the SEC together with Matt Gallagher, the controller. We had a meeting, several meetings.

"Q Was anyone from Touche Ross present?

"A Yes.

"Q Who from Touche Ross?

"A I believeHeft.

"Q Was Mr.Asch present?

"A Yes.

"Q Was anyone else present?

"A George Faunce, Si Flug and Matt Gallgher.

"Q Did Mr. Asch ever show you these comments?

"A I think he sent me a copy of them.

"Q I am referring specifically now, Mr. Fugazy, to

comments from the accounting section on financial statements of Diners' Club, Inc.

"A I just don't recall having seen them.

"Q Do you recall any specific conversations that you had on this subject?

"A I recall meetings being called by Mr. Faunce to discuss the problems and completing the SEC registration.

"Q Do you recall any sp-cific meeting with Mr. Faunce on these problems?

"A Offhand, I just don't know.

"Q What did Mr. Faunce say those problems were?

"A Monumental.

"Q Aside from being monumental, what were the problems?

"A There were all sorts of problems both in the credit card area, the travel card area, the collection agency. All of these subsidiaries had certain problems that had to be cured or corrected before a registration would be approved by the SEC. They wanted a new accounting technique on the franchise income both for Diners' as well as Diners/Fugazy, some clarification on the Continental holdings where certain of the conversion rights would have to be executed. There was a serios of problems.

"Q Were you ever present at any meeting at which any

decision was made on any of these problems?

"A No, it got to be so difficult that it became more and more apparent that the registration was going to be -- excuse the expression -- a monumental task to get through.

"Q Was any negotiation to your knowledge made by Mr. Faunce as to whether Diners' Club, Inc. intended to comply with the SEC request?"

Statement by counsel:

"MR. MARR: That's objected to as leading.

"A No, I believe Diners' Club tried to comply with the SEC request. It got to be avery slow and tedious problem. Finally when Continental tendered, you know, it killed the whole situation. They just withdrew it. I believe that up to the time of the Continental tender that an effort was being made to comply with the SEC.

"Q Do you know whether an effort was being made or is that your surmise?

"A No, I was not really involved with it, no. I mean, it was certainly a drawn out process, but I don't know whose fault it was. It didn't appear like they were getting anyplace."

Mr. Fugazy, do you recall testifying under oath and giving those answers in answer to those questions on

November 11, 1971 in this case?

A If it is my testimony, I recall it. I can't recall the exact testimony, but I recall it.

Q With respect to your claim that Diners' failed to use its best efforts to make effective the registration statement, Mr. Fugazy, would you like to withdraw that claim?

A I don't think I have said anything different today than what I said there. I don't understand where there is the disparity. They were going through the efforts, but it wasn't resulting in anything. They would like to have withdrawn it. I am saying the same thing. There were serious problems. I didn't recall about the trip to Washington. I didn't go to Washington.

Q Mr. Fugazy, let's get to your own claim about your contention that Fugazy Travel Bureau was fraudulently induced to sell its assets to Diners' Club in1967.

Would you please tell the jury and the Court, if you can, what Fugazy Travel Bureau received from Diners' and what Diners' paid for the assets of Fugazy Travel in 1967?

THE WITNESS: Your Honor, I am going to be guessing because I --

THE COURT: In other words, you have no clear recollection?

Q Were they part of the same discussions?

A No.

Q What do you mean they were not part of the same discussions? Explain that, please.

A Well, Bloomingdale took it upon himself to work out my deal because he had a serious problem. I was going to be making more money than he was earning in Diners' Club and more money than Victor Herd was making in Continental. We had to meet and discuss it. They had to change salary schedules.

He negotiated the deal separately with me on my salary and then my compensation.

Q Mr. Fugazy, was it discussed at this time, and I will talk about the dates that you gave, June, July and August of 1967 -- was it discussed between you and Mr. Bloomingdale and were you discussing going to Diners' as an employee apart from whether or not there was a sale of assets?

A No.

Q So your discussions with respect to becoming an employee of Diners Club were tied in with and were dependent on whether or not you went ahead with the sale of assets?

A Oh, I would say definitely.

THE COURT: I believe you did testify previously that Mr. Bloomingdale had wanted you and your personal ser-

vices and that you indicated that you would not come and just leafe the travel agency?

A That's right, yes, sir.

THE COURT: I gather your position was, it was take me with it or don't take me at all?

A Yes, sir.

Q You see the reference in page 24 to salary of $35,000 per year for Louis Fugazy?

A Yes, sir.

Q Was that also discussed at the same time next with the sale of the assets, at the same time the discussions were going on just as your employment agreement was?

A Yes.

Q You also see on page 24 -- I think you discussed this on your direct, Mr. Fugazy -- the reference to your receiving some portion of the franchise fees for the sales of franchises that would be made by Diners/Fugazy Travel after the purchase of assets?

A Yes.

Q All right.

When you were negotiating the sale of assets to Diners' Club, did you discuss with Mr. Marx or by yourself -- were you and/or Mr. Marx receiving the right to receive some part of these franchised fees that would be sold aftward?

* * * * *

There are some numbers--

MR. FREDERICKS: Do you want a clean copy?

THE COURT: I don't think so. The numbers are not part of the report itself and should be disregarded. The exhibit is in evidence.

Perhaps Miss Kruger can erase the penciled numbers, and that will take care of the problem.

(Defendants' Exhibit G for identification was received in evidence.)

Q Mr. Fugazy, I put before you Exhibit F, which you have identified as the June 30, 1967 financial statement of Fugazy Travel, and I put before you Exhibit G, which is entitled Diners' Club, Inc. annual report year ended March 31, 1967, and I ask you to open to the statement of assets and liabilities, sir, in both documents.

A Yes.

Q Now, Mr. Fugazy, looking at the Fugazy Travel balance sheet, do you see the statement there, the total assets of $4,230,225?

A Yes.

Q Does that appear to be accurate, to the best of your memory?

A I would think so.

Q I want you to turn to page 6 of the Diners'

Q Yes.

A Fugazy Travel Bureau?

Q Yes.

A I would say it did.

THE WITNESS: I said Fugazy Travel Bureau, your Honor, specifically, because without the other companies that were taken into it, Fugazy Travel Bureau itself, I believe, did.

Q In 1966?

A Yes. I'm not sure, but I think it did.

Q Now about 1965?

A I think Fugazy Travel Bureau itself made profits every year. It was some of the companies that we picked up and took from the--I'm sorry--the Tower acquisition that were carrying losses.

Fugazy itself has pretty well always been, you know, profitable.

Q Now, Mr. Fugazy, did you in 1967, when you were talking to Diners' or when you were talking to Mr. Marx about the Diners' discussions, did you ever have any discussions with Mr. Marx about the fact that Diners' had assets in the range of $108 million? Did you ever hear that number before?

A No.

* * * * *

mpjp 17 W. Fugazy-cross

A We had whatever adequate cash we needed. We never had any problems with cash.

Q Do you know how much you had?

A Excuse me. Do you want--you mean as of June 30th?

THE COURT: You don't know as of June 30th without refreshing your recollection from the balance sheet?

THE WITNESS: No. We never had much cash, because we had big receivables, but we had no problem.

THE COURT: Looking at the balance sheet, will you tell us if that refreshes your recollection as to the cash of Fugazy Travel Bureau, Inc. and subsidiaries as of June 30, 1967?

THE WITNESS: Cash and assets of $2,097,000, including $5,507 cash. Accounts receivable, $1,770,000, less reserves of $87,000. Notes receivable of $91,750. Prepaid expenses and deposits of $229,788. Total of $2,093,987.

I guess they took off the receivable that wasn't current, less 297.

THE COURT: So that your cash, as I understand it, was in the amount of $5,407?

THE WITNESS: You mean cash on hand?

Q You mentioned a moment ago that Mr. Marx wasn't happy with Diners' depending on Continental to get financing.

Did you have any discussion as to wehther or not your company could sustain itself on its own operations without the loans that Mr. Marx was making?

MR. FREDERICKS: Objection, your Honor. There is no evidence of any loans yet.

MR. SANTORA: I will rephrase that if there is no evidence. I thought there was.

Q Do you know how much financing Fugzy Travel obtained from any source in the period of 1963 to 1967?

A As I stated before, I thought we had about a million five in loans or borrowings.

Q Look at the liability side here, Mr. Fugazy.

I see a reference to notes payable to stock-holders. That is a liability of the company, $825,000.

Who was that money owed to?

A I would think that was Otto Marx.

Q Was any of it owed to you?

A It may have been, your Honor. I don't know.

Q Do you have any clear recollection?

A No.

THE COURT: Who were the other stockholders in June of 1967?

A Mr. Marx was and some associates of his were all the stockholders.

At that point my brother and I were not stockholders.

THE COURT: Were you not a stockholder?

THE WITNESS: No.

THE COURT: So that notes payable to stockholders would have been Mr. Marx and/or his associates?

THE WITNESS: I just don't know. I would think -- I wouldnot think that the other associates of his had made loan to the company. I would think it was principally Mr. Marx or one of his companies.

THE COURT: Was one of his companies a stockholder?

THE WITNESS: No, I agree with you, your Honor. I would think it would be Otto Marx.

THE COURT: So $825,000 was owed by Fugazy Travel Bureau to Mr. Marx on June 30, 1967?

A It would appear so, your Honor.

THE COURT: All right.

Q The next item there, Mr. Fugazy, under liabilities where it says notes payable to Travel Credit Corporation, 1,465,000, do you know who the principals of Travel Credit Corporation were?

A That was Mr. Marx' company, I believe.

Q Does that indicate to you that the company owed Mr. Marx some $2,290,000 at that point?

THE COURT: Sustained.

Q Mr. Fugazy, in your view, could Fugazy Travel had continued to operate in June of 1967 under the present situation without the moneys advanced by Mr. Marx or his companies?

A Could we have -- you mean if Mr. Marx took his money out?

Q Yes.

AWe would have to have other finances. Mr. Marx was putting more money in if ever we needed it. There was no problems.

Q All right.

Did you have any discussions with Mr. Marx as to whether or not Fugazy Travel was going to accomplish the things that you said you wanted to do in some way in '67 if they didn't go ahead with the Diners' situation?

MR. FREDERICKS: Your Honor, I --

THE COURT: Sustained.

Q You said a moment ago, Mr. Fugazy, that Diners' -- Mr. Marx didn't like the financial picture at Diners', you didn't want to count on Diners' to provide the wherewithal, the financing to go ahead with some plans that Fugazy

Travel had.

Let us take ourselves back to June of 1967 and tell us, Mr. Fugazy, if you and Mr. Marx prior to the time that Diners' negotiations started with exploring any other alternatives to accomplishing these things that you needed the financing for?

A Your Honor, I think I testified.

THE COURT: I thought it was covered. All right. It may be preliminary to another question.

You were speaking, as I recall, with some underwriters?

THE WITNESS: Yes, your Honor. We were talking to several companies. I mean, we had no pressing needs to have to talk to anyone.

THE COURT: Did you speak to anyone else relative to obtaining moneys aside from the underwriters you mentioned already?

A Not that I am aware of, your Honor. Mr. Marx handled all that all the time. All I know, we always had enough money to pay our bills and had no problems. Mr. Marx made sure of that.

Q In June of 1967 was Fugazy Travel able to borrow from a bank without Mr. Marx' guaranty?

A I would think not.

* * * * *

it -- I thought the synergism was great.

Q I would like to read from your deposition, Mr. Fugazy, conducted on July 22, 1971, which has already been marked as Defendants' Exhibit A in this case.

Reading from page 16 of that transcript --

A I don't have it.

Q I am reading it, Mr. Fugazy.

MR. TOLAN: Tell me what you are going to read, please.

MR. SANTORA: Page 16 of that transcript, line 9 through 15, Mr. Tolan.

Q On July 22, 1971, you were asked these questions under oath at your deposition. I am sorry, let's move that back to line 2 so we can get a full understanding of it.

"Q At the meeting on June 23, between Mr. Liftig, Mr. Marx and yourself, what did Mr. Liftig say at this meeting?

"A Well, Liftig again said to Marx that Bloomingdale wanted very much to buy Fugazy Travel and would be interested in it and again repeated for Marx' edification the dramatic changes in Diners' Club vis-a-vis Continental.

"Q What did you say at this meeting?

"A I said that I wasn't particularly interested in the deal. I was never too -- I was never too thrilled

Q Do you remember a Mr. Piscatella?

A Tony Piscatella.

Q Tony Piscatella.

A He used to work for Busetti for a while. He's not there any more.

Q In, let us say 1966, Mr. Fugazy, did you have any idea of how Pierre Busetti compared in size, let us say, to Fugazy Travel?

A In the United States?

Q Yes. In the United States

A I didn't think they ranked within the first 30.

Q Now, do you recall whether or not conversations were going on between Mr. Marx and somebody from Pierre Busetti in or about 1966 concerning a possible purchase of Fugazy Travel?

A As I say, I know we talked to Busetti. Whether we were going to buy them or they were going to buy us, nothing, thank God, materialized.

Q Well, in 1966, Mr. Fugazy, were you still carrying your loss deficit and your minus net worth?

MR. FREDERICKS: I will object to that, your Honor.

THE COURT: Sustained.

Q Do you recall that you were interested in buying any companies in 1966, Mr. Fugazy?

A We bought some companies, sure.

Q Were you interested in selling at all to Pierre Busetti in 1966?

A No--

MR. TOLAN: Would the questioner say, when he says, "you," does he mean "you" personally or Fugazy Travel?

THE COURT: Sustained as to form.

MR. SANTORA: I appreciate that.

Q I will say, Mr. Fugazy, when I am talking about purchase of Fugazy Travel, when I say "you" in that last question, I am referring to the company: Fugazy Travel.

A Well, I didn't own the company, so I can't speak for what Mr. Marx may have been doing, but I certainly would have been surprised, but I think I would have been shocked had Mr. Marx been talking about selling our company to Pierre Busetti. I just don't think--

Q Why do you say that?

A Because it was a bad company.

Q Bad in what way?

A Reputation, financially. They are shut--they're out of business. They have been out of business for years. They may still be in business in the United States, but

all their Italian operations are shut down.

Q Well, would you say in 1966 they had a bad financial reputation?

A Yes.

Q Very bad?

A In Europe, very bad.

Q How about here in the States?

A Oh, I don't know about the American company. They weren't owned by the same people. But they had a bad reputation in Europe.

Q Now, do you recall ever--

A Excuse me. I don't mean Piscatella. He had a good reputation.

Q How long have you known Mr. Piscatella?

A How long have I known him?

Q Yes.

A Ten, fifteen years, in and out of the industry.

Q Well, in 1966, if I suggest to you, Mr. Fugazy, that Mr. Piscatella was employed at Pierre Busetti, I will ask you if you recall speaking to Mr. Piscatella in 1966. I will say in the period of April or May of 1966.

A Could well have been.

Q Did you speak to Mr. Piscatella about any possible acquisition of Fugazy Travel by Pierre Busetti

in that period of 1966?

MR. FREDERICKS: Your Honor, I am going to object at this point. This is so far beyond the direct, and it is getting into collateral matters. I realize this is cross examination, but I don't see that we are going anywhere but into collateral matters. It is clearly beyond the direct examination, and I don't see the relevancy, and I am going to object to this continuing line of questioning.

THE COURT: Are you going to be pursuing this line for any length of time, counsel?

MR. SANTORA: No, I am not, your Honor, but I would like to mark an exhibit.

THE COURT: All right. I will sustain the objection, and at this point, if you wish to offer an exhibit, you may do so.

(Defendants' Exhibit H marked for identification.)

THE COURT: We will call this a memo of understanding at this point.

Q Mr. Fugazy, I place before you Defendants' Exhibit H and ask you to take a look at that, please. Is that the letterhead of Fugazy Travel Bureau that your company was using?

mpjp 5 W. Fugazy-cross

When I say "your company," I mean that Fugazy Travel Bureau was using in 1966.

A Yes. I would think so. It looks like it.

Q Have you ever seen a copy of this memorandum before today, Mr. Fugazy?

A No.

Q Have you ever heard of its existence?

A No--well, existence--as I said, I knew that Marx was talking to Pierre Busetti. I met with them--what is the year?

Q 1966.

A '66. I met with them. I met them in Europe once, but nothing ever developed. I didn't know that Marx had even reduced this to a possible--I saw this the other day. Excuse me. I have seen this before, but I didn't even know that Marx had reduced it to the possibility of an understanding.

The deal never went through, and I never even discussed it or knew about these terms.

Q Did you know that the talks were going on?

A I said that. In fact, they talked to me.

Q I understand that. Did you discuss any of the terms with people from Pierre Busetti?

A Not at all.

Q What did you discuss with them about the talks?

A. I thought it was a different thing. I thought Marx was talking to them about a joint venture, whereby-- I think what we were going to do is, we were going to package their product in the United States.

They had one office or two offices in the United States, and they were going to service us in Europe, and I recall going to Milano to meet Frankolini, who I think was Tony Piscatella's boss, and I may have even met the owners, but it wasn't, in my opinion, it wasn't a program whereby they were going to buy us.

We were going to do a joint venture together, or we were going to take over their American company. I just am not familiar, and I have never read this before.

THE COURT: I am sorry. I must have missed that. You said you never read this before, but you said a few moments--

THE WITNESS: I think yesterday my counsel asked me something about Pierre Busetti, and I asked, "What is Pierre Busetti?"

They showed me something. The only thing I noticed--it says "William Fugazy would be a consultant." I saw that stand out. That's why it struck me as being the same document.

Yesterday, counsel showed it to me.

Q You mentioned being a consultant, Mr. Fugazy. Did it ever come to your attention that there were discussions going on between Fugazy Travel and Pierre Busetti, that some arrangement would happen whereby you could become a consultant to Pierre Busetti at some salary?

A A lot of people might talk about things--

Q I asked you if you ever knew about anything like that going on in 1966.

A Never with me.

Q Well, do you remember any discussion about someone committing--Mr. Marx committing you or suggesting to Pierre Busetti that you would engage in a non-competitive clause with Pierre Busetti?

THE COURT: Sustained.

Q Can you tell me anything, Mr. Fugazy, that Mr. Marx may have said to you or that you remember Mr. Marx having said to you about these discussions?

THE COURT: I think that has been asked and answered, but I am going to allow it once more. I hope counsel will move on.

(To the witness) You may answer the question.

A Mr. Marx asked me to meet with either Frankolini or Tony Piscatella or someone else, about the

possibility of Fugazy doing something with Pierre Busetti. I also have a recollection of having, when I was in Europe on a trip, meeting with them. They wanted me to see their facilities. They wanted to take over our Italian operation. We had an office in Milano and in Rome.

I did not believe, to be very honest with you--I am totally surprised at seeing this reduced to paper, because I don't--now, Mr. Marx can say I was wrong.

I just don't remember discussing these terms or conditions or anything. I just never thought they reached that stage, and obviously they didn't reach any stage, because they never happened, but I never saw this document before.

Q Well, did it ever come to your attention as to how these talks ever broke off or were cancelled or terminated or anything like that?

A No.

MR. SANTORA: Your Honor, I would like to offer Exhibit G into evidence.

THE COURT: All right. G is already in evidence.

MR. SANTORA: I am sorry. I mean Exhibit H.

THE WITNESS: Do you want these other exhibits?

MR. FREDERICKS: What is G?

THE COURT: G is the annual report. He mis-spoke himself. H is the document the witness indicated he didn't see before, I believe he stated yesterday.

MR. FREDERICKS: I don't see any foundation for letting this document in through this witness.

THE COURT: At this time I suggest it would be appropriate for me to sustain the objection. It doesn't mean that a later time will not come where it might be admissible.

MR. FREDERICKS: As to G I have no objection.

THE COURT: G is in already. He just thought G was H and H was G.

The objection is sustained to H for the moment. It will remain marked for identification.

Q Mr. Fugazy, do you recall testifying in answer to questions by Mr. Fredericks that you met Mr. Marx in or about 1962?

A Yes, sir.

Q And was that in connection with the sale of Fugazy Travel Bureau by Tower to Mr. Marx's company?

A Yes, sir.

Q And I think you indicated at that time that you knew that Mr. Marx paid about $1,500,000 for Fugazy Travel. Is that what you recall?

mpjp 11

A Yes, sir.

Q Now, the time that Mr. Marx was speaking to Tower, were you a director of that company?

A I don't recall. I may have been.

Q By the way, can you tell me who approached whom on that situation?

MR. FREDERICKS: What is he talking about?

THE COURT: I don't understand it, either. Restate the question.

MR. SANTORA: Yes.

Q Did Mr. Marx approach Tower or did Tower approach Mr. Marx to buy the company?

A I believe Mr. Marx approached Tower. I'm not sure, though.

Q Now, whether or not you were a director of Tower, which you are a little unsure of today, did you have a position in Fugazy Travel Bureau itself?

MR. FREDERICKS: I am going to object to the form of the question, your Honor.

THE COURT: Yes. What was it? In 19--

MR. FREDERICKS: 1962, your Honor.

THE COURT: In 1962, was that when Mr. Marx purchased the stock of the Fugazy Travel--

THE WITNESS: Bureau.

THE COURT: --Bureau from Tower?

THE WITNESS: I believe that was the date, your Honor.

MR. SANTORA: Your Honor, I believe the witness' testimony was that he purchased it in '63, but that the negotiations started in '62.

THE COURT: All right. Fine.

At the time the negotiations began, in 1962, were you an officer of Fugazy Travel?

THE WITNESS: Yes, sir. I was president.

THE COURT: Did you remain an officer after the negotiations were completed?

THE WITNESS: Yes, sir.

THE COURT: And was that in the position of president?

THE WITNESS: Yes, sir.

Q And did you participate in any of the discussions with Mr. Marx prior to his agreeing to purchase the company?

MR. FREDERICKS: Your Honor, I am having difficulty following the questions.

THE COURT: Yes. I assume--and it is difficult for a witness to assume--you are talking about Mr. Marx's purchase from Tower.

MR. SANTORA: Of Fugazy Travel.

THE COURT: Yes.

At the time of the purchase by Mr. Marx of Fugazy stock in Tower, at the time that was being negotiated, did you have conversations with Mr. Marx on the subject?

MR. FREDERICKS: Well, your Honor, that is my problem. On the subject of the negotiations or any subject at all?

THE COURT: Any conversations.

THE WITNESS: Yes, sir.

Q Did you discuss with him the negotiations going on between Tower and Mr. Marx for the purchase of Fugazy Travel?

A No.

Q Did you ever have any discussions with people at Tower concerning these negotiations?

THE COURT: That is while they were going on?

Q While these negotiations were going on in '62 and up to '63, when he bought it?

A I would think so. I can't recall anything, but I don't think so.

Q I want you to think carefully, because you were talking to Mr. Marx about your coming with the company.

THE COURT: Sustained.

Q Do you remember speaking with Mr. Marx at some time when he spoke about coming with the company, when he purchased it from Tower?

A I don't--

Q You were with Fugazy Travel and Mr. Marx was talking to Fugazy Travel. Did you have any discussion with Mr. Marx while these negotiations were going on about the possibility of your staying with the company after Mr. Marx would purchase it?

A Yes.

Q Had Mr. Marx purchased the company at the time you met with him?

THE WITNESS: Your Honor, I can't follow. I'm just lost. I'm sorry.

THE COURT: He doesn't understand the question.

Next question.

Q Did you meet with Mr. Marx and have any discussion concerning the Tower-Marx discussions about the possible purchase of Fugazy Travel before the consummation of the purchase?

MR. FREDERICKS: That's been asked and answered.

THE COURT: I thought he answered, "No."

That is the question I thought you asked be read back.

MR. SANTORA: He is changing it, your Honor.

Q You said you don't recall any discussions, but I am referring back to your earlier testimony.

A I didn't say I was having any discussions.

Q No, Mr. Fugazy. At some point you had a conversation with Mr. Marx about coming with him. Do you remember you said you were going to be a 50 per cent owner at some point after Mr. Marx recouped his investment?

A I don't think that was my testimony.

Q You don't remember testifying to that, sir?

A Not exactly that way. I mean, you're changing what I said.

Q I don't mean to. If I have changed it, please--

A I can explain it to you, if his Honor will let me. I will try to explain what I did, if that--

THE COURT: Do you want an explanation, counsel?

MR. SANTORA: No. I will ask the questions, your Honor.

THE COURT: All right. Ask him another question, then.

Q Did you ever have a meeting with Mr. Marx at all before the close of the purchase from Tower to Fugazy Travel?

A Yes.

Q All right. Now, do you know where you met with him?

A I would think in my office.

Q The office of Fugazy Travel?

A Yes, sir.

Q And while he was there, did Mr. Marx put any questions to you at all concerning the business of Fugazy Travel?

A Yes.

Q Do you recall what it was Mr. Marx asked you?

A "How's business?"

Q And do you recall approximately when this was?

A 1962 to '63.

Q Before he closed the purchase?

A Well, you said while he was negotiating, yes.

Q When he asked you, "How's business," do you remember what you said to him?

A It depends on what day of the week it was. I mean, I'm sure I told him how business was. I don't recall exactly how business was then. Business in Fugazy was probably good, and business in the other companies probably wasn't good, but he talked to me about how the company was doing.

Q And did he also talk to you about how it operated and the mechanics of how it operated?

A Well, he studied it for six or eight months before he bought it.

Q I am not asking that. I asked, did he talk to you.

A He certainly did.

Q Mr. Marx was not experienced in the travel business, was he?

A I don't, you know, recall his having any background in that. He was a financier banker, but I don't recall.

Q Didn't he come to you to find out something about the travel business at that time?

A I don't think I have ever testified to that, no.

Q Did Mr. Marx ever ask you at that time to fill him in on how the company was operated, where it got its profits from, how you were operating it, what its financial picture was?

MR. FREDERICKS: Your Honor, counsel is jumping from one question to the other.

THE COURT: Is the objection as to form?

MR. FREDERICKS: Yes.

THE COURT: It is several questions wrapped into one. I am sure counsel appreciates that.

Q Did Mr. Marx ask you at that time, the time you are speaking of now, to fill him in, to give him some of your knowledge and some of your background to him in the travel business, the operation of Fugazy Travel?

MR. FREDERICKS: I am going to object.

THE WITNESS: No, your Honor. I don't understand what he is trying to get from me.

THE COURT: He doesn't understand the questions.

Q I am trying to get from you, Mr. Fugazy, what you told Mr. Marx, if you can remember what you told Mr. Marx.

A I will give you my conversation.

Q I am sorry.

A I will give you my conversations with Marx if you want them.

Q All right. Let's try it one more time.

Do you recall, apart from how his business is, any specific question that Mr. Marx put to you at the time you are speaking of, about the business of Fugazy Travel?

A No, sir; I don't.

Q You don't? Do you recall anything specific

that you said to Mr. Marx about the possible purchase of Fugazy Travel, that he was looking into and negotiating?

A I can recall conversations that we had. We must have had fifty conversations before he bought the company, but I just can't recall a specific question on a specific day or a specific answer.

Q I am sorry. You said you had fifty conversations with him?

A Well, I'm exaggerating. I must have had twenty, twenty-five.

THE COURT: That is, prior to his acquisition?

THE WITNESS: Yes, sir.

THE COURT: Of Fugazy Travel?

THE WITNESS: Yes, your Honor.

Q And were all of those conversations at your office or some place else?

A No. At his house. I think we met in Europe. You're going back fifteen years, and I'm not that, you know, sharp without diaries, but we had many meetings.

Q And during those meetings were you talking about the possible purchase of Fugazy Travel with Mr. Marx?

A That was the purpose of the meeting.

Q And were you also talking about a possible role

that you might play in the company after he purchased it?

A He was talking to me about that. I wasn't talking to him about that.

Q When he was talking to you, what were you doing?

A I was listening.

Q And did you say anything back to him, or did you just sit there and listen?

A Well, it's tough to have a one-way conversation with somebody, so I think I replied to him or it wouldn't have gone on very long.

Q Do you recall what he said to you and what you said to him?

A Can I tell you the conversation? I offered to do that, minutes ago.

Q I asked you what you said to him and what he said to you.

THE COURT: You are rolling twenty conversations into one, I assume, at this point.

MR. SANTORA: I don't know if the witness is going to break them down.

THE COURT: I don't know if he can, either, and if you want to ask the question in the form you have, I will permit an answer.

MR. SANTORA: I would, your Honor, to save time.

THE COURT: All right.

(To the witness) You indicated that prior to Mr. Marx's acquisition of Fugazy Travel you had a number of conversations with him; is that correct?

THE WITNESS: Yes, your Honor.

THE COURT: Could you state in words or substance the contents of those conversations?

THE WITNESS: Yes, sir. Mr. Marx had come to me through the suggestion of one of the officers of Tower. He indicated that he would like to buy our company, because he had looked into us and thought it was an attractive situation.

He said that he would appreciate my filling him in on what the company, what it was doing and what its background was and where it was going. I did that.

Several meetings after, Mr. Marx came back--excuse me--several days or weeks after, Mr. Marx came back and said he wanted to pursue the matter further, but he did not want to do it unless he could be assured of the services of my brother and myself.

I told Mr. Marx that--I don't recall whether we had employment contracts at that time. I think we did. I told Mr. Marx that obviously if we had an employement

contract, as far as myself, I would honor it, and I am sure my brother would. He said would we be willing to be a partner of his and to take the business back from Tower, and I told him that we certainly would be interested in listening, and we listened, and we met, and we met and finally Mr. Marx decided to buy the company, and with nothing in writing but his word, which has always been good for all the years I have known him, he said, "I will give you 50 per cent of this company some day back to you and your brother after I have gotten back my purchase price," because at that time, again, I had taken stock, and it was worthless, so we hadn't gotten anything for selling the business, which we had had in the family for a hundred years or ninety years.

So Mr. Marx made that proposition to me. I accepted it. We never had it in writing, and he kept his word from the time of the Diners' acquisition by giving my brother and me 50 per cent.

THE COURT: We will take our luncheon recess at this time.

Ladies and gentleman, please, don't discuss the case among yourselves or remain in the presence of any other person who might be discussing the case.

Please keep an open mind on all facets of the

case until it has been completed and given to you following my charge.

The jury is excused and counsel are excused, and the witness may step down.

(A luncheon recess was taken.)

AFTERNOON SESSION

1:30 p.m.

(In open court; jury present.)

W I L L I A M D. F U G A Z Y, resumed.

THE COURT: Good afternoon, Mrq Fugazy, again I will suggest that you are continuing your testimony under the oath which was administered when you first took the stand: Do you understand that?

THE WITNESS: Yes, your Honor.

THE COURT Very well, you may proceed, Mr. Santora.

CROSS EXAMINATION (Continued)

BY MR. SANTORA:

Q Now, Mr. Fugazy, I asked you this morning if you were a direct of Tower Corporation, and I wonder if you have had a chance to think about that?

A I thought I was, but I am not sure. I believe I was. I am still not sure.

Q Do you knwo when you became connected with Tower?

A 1961 or 1962.

Q And didyou become connected with Tower through a sale of Fugazy Travel Bureau?

A Yes, sir.

Q Do you recall exactly how much you received

for the sale of Fugazy Travel Bureau to Tower?

A It was shares of stock. There was no money. I don't recall. I have no recollection.

Q You sold it for shares of stock?

A We took share of Tower for our shares.

THE COURT: That was an exchange of some kind?

THE WITNESS: Tax free exchange.

Q And in return for the stock, did you transfer or sell to Tower the company, Fugazy Travel Bureau, that we have been talking about?

A Yes.

Q Were those shares publicly traded?

A Yes.

Q Tower shares?

A Yes, on the American Exchange.

Q The American Exchange. Do you have any idea what the market value was at the time you received it?

A I have no recollection.

Q Not even any approximation?

A No, sir.

Q And how long -- you say it was about '61 -- were you with Tower about two years before Mr. Marx came along?

MR.TOLAN: Your Honor, I object to that question, the form of the question.

THE COURT: Sustained.

Q At the time you made the sale to Tower, were there any discussions between yourselves and the Tower officials concerning the financial condition of Fugazy Travel?

MR. FREDERICKS: Your Honor, I don't see the relevance.

THE COURT: I don't, either, frankly, but I'm going to permit it. It is cross examination, and if you can elicit something --

A I don't recall.

THE COURT: Go ahead. He says he doesn't recall.

Q Well, do you recall at all whether or not at the time of the purchase you produced any financial statements of Fugazy Travel and gave them to Tower for their review, at the time you made the purchase or exchange?

A I am sure we did, but I just don't recall.

Q Do you recall whether or not at any point following the purchase by Tower they registered any claim against you or Louis Fugazy with respect to the financials or any other aspect of the purchase?

A No, they didn't.

Q Do you recall at the time that you entered into the arrangement with Tower, that you signed an indemnity or

warantees and representations concerning the condition of Fugazy Travel?

MR. FREDERICKS: Your Honor, I don't see the relevance at all.

THE COURT: Maybe he is testing his recollection. I will let him ask it.

A I just have no recollection of of this at all.

MR. FREDERICKS: Your Honor, may I see the document before it is shown to the witness?

MR.SANTORA: Yes.

Q Mr. Fugazy, I show you a document entitled Defendants' Exhibit I and ask you if you have ever seen a copy of that before (handing).

A It has my name on it. I would think I did.

Q Do you know what that concerns, sir?

MR. TOLAN: Objection, your Honor.

MR. FREDERICKS: Objection, your Honor.

THE COURT: Sustained.

MR. SANTORA: Your Honor, may I approach the bench?

THE COURT: It's the form. "Do you know what concerns" calls for a conclusion on his part.

Restate your question and I might allow it.

Q Can you tell me what that is, Mr. Fugazy, that you have before you?

MR. FREDERICKS: I object. It has only been marked for identification.

THE COURT: Have you seen the document before?

THE WITNESS: I don't recall it at this time, your Honor.

MR. SANTORA: I request because I don't think it's proper to speak in front of the jury at this time--

THE COURT: Ask him another question. I just won't permit you to ask a question, what does it concern.

That is the problem.

Q Is there a date on that document in the front, Mr. Fugazy?

A I can't see one. Excuse me, June 17, 1963.

MR. FREDERICKS: I object, your Honor. I object to this question, this whole line of questioning.

THE COURT: I will just take a yes or no answer. That might end it.

I won't go into the substance until I have heard counsel.

Do you recall testifying on that day?

THE WITNESS: No, I don't recall it.

MR. SANTORA: I will ask another question.

THE COURT: Ask your question. If there is an objection, I will hear you.

Q Mr. Fugazy, do you recall having your deposition taken in a suit by yourself against Time, Inc. on June 17th, the date that appears on that deposition?

MR. FREDERICKS: Objection, your Honor. It is totally irrelevant to these proceedings.

THE COURT: He may again be testing the witness' credibility.

Do you recall such a thing?

THE WITNESS: I remember a lawsuit. I don't

recall testifying on any particular day.

Q Do you remember that you had your deposition taken in the suit against Time, Inc.?

MR. FREDERICKS: Objection, your Honor.

THE COURT: Do you recall that? I will permit it.

THE WITNESS: I had depositions. I recall, your Honor.

Q Do you recall that during the course of your deposition you were asked questions and you gave answers under oath concerning the sale of Fugazy Travel Bureau to Tower, Inc. in 1971?

MR. FREDERICKS: I am going to object, your Honor.

THE COURT: Sustained.

Q Mr. Fugazy, do you recall any question or claim arising out of the audit prepared by Tower in 1961 over the assets or financial condition of Fugazy Travel in the amount of $500,000?

MR. FREDERICKS: Objection, your Honor.

THE COURT: I will ask the witness to answer yes or no, if he does recall such a thing.

A A claim of Tower against me?

Q And your brother.

A The answer is I know of no such claim and I don't recall. I don't know of such a thing. I never heard of it.

Q In the case the word claim is the problem as it was yesterday, do you know if--

THE COURT: Let's not have editorializing. You know how to ask questions.

The jury will disregard that last remark.

Q Do you know if anyone from Tower ever questioned any of the amounts of the assets that were transferred to them in 1961 by Fugazy Travel?

MR. FREDERICKS: Objection, your Honor.

THE COURT: Sustained.

Q Did anyone from the Tower Company speak to you or your broker, Louis, in 1961 concerning any warranty or indemnification that you had given them when you sold the company to them in 1961?

MR. FREDERICKS: Objection, your Honor.

THE COURT: I will allow it.

A I don't recall any such conversations or any such claims.

Q Do you know, Mr. Fugazy, if following the purchase by Tower of Fugazy Travel any adjustments were suggested or made in the purchase price?

THE COURT: Yes or no.

Do you recall?

THE WITNESS: No, sir, I don't recall.

Q Mr. Fugazy, you mentioned that Mr. Marx purchased Fugazy Travel from Tower for the amount I think of 1.5 million dollars.

Do you recall saying that, sir?

A I think I said approximately that amount.

Q Approximately. Do you know if there were any subsequent reductions in that purchase price after 1963, after Mr. Marx purchased the company?

A I don't recall.

Q Do you know what form the 1.5 million was? Was it all cash or was it something else?

A I think it was 750,000 or half a million dollars down. I'm sorry, it's so long ago I just--you will have to ask Mr. Marx. I just can't remember.

Q Do you recall some of it was cash and some of it was something else?

A If it wasn't cash, it would be notes. I think it was half cash and half notes.

Q Do you recall there was a note then in the area of 750,000 or something like that? Is that your best recollection?

A I just have practically no recollection at all on it.

Q Mr. Fugazy, I ask you to look at Exhibit F, which is the financial statement we were talking about this morning, June 30, 1967 of Fugazy Travel.

A Yes, sir.

Q And also to remind you that you have signed this document.

A Yes, sir.

Q I ask you to look at the footnotes which appear on the last page.

A Right, sir.

Q Do you see a reference there to notes of $900,000 under the item 2, good will? Do you see that, sir?

A Yes.

Q Does that refresh your recollection at all as to whether that was the note that Mr. Marx gave to Tower?

A No, I don't. I just can't trigger my recollection concerning that.

Q There is a number of 265,000 which appears there and it says--

MR. TOLAN: I object, your Honor. This is in evidence here. It has already been received in evidence.

To read anything in there, I think this is a complete waste of time, your Honor.

THE COURT: I haven't heard a question yet. I am going to permit a question to be asked. If I think it is irrelevant after I have heard from you, I will sustain your objection.

If it is relevant, I won't. I think he is entitled to frame a question on the basis of a document in evidence.

Let's begin the question over again and let me listen.

Q Mr. Fugazy, would you please look at this item number 2?

A Yes, sir.

Q Do you see in paragraph number 2 under good will where it talks about the notes of 900,000 settled for 265,000?

MR. FREDERICKS: If we are going to refer to a document, your Honor, that is in evidence, may we read it and not summarize it?

MR. SANTORA: I will do that.

THE COURT: I will try to help a little bit here, if I may.

I refer you at this point, Mr. Fugazy, to

Defendants' Exhibit F, to the page marked notes to financial statements.

Do you have that in front of you?

THE WITNESS: Yes.

MR. TOLAN: I think it's F, if I may, your Honor.

THE COURT: Isn't that what I said, Mr. Reporter?

(Record read.)

THE COURT: Do you see the item 2 headed good will?

THE WITNESS: Yes, your Honor.

THE COURT: I now refer you to the next to the last sentence in that paragraph, "On August 22, 1967 the unpaid balance of the notes of $900,000 were settled for $265,000 and the difference less costs reduced good will."

Do you see that?

THE WITNESS: Yes, your Honor.

THE COURT: The notes which I referred to there, are they notes which were held by Mr.Marx?

THE WITNESS: I just have no recollection as to how that came about, your Honor.

THE COURT: In other words, you do not know

what those $900,000 worth of notes which were unpaid as of August 22, 1967 consist of? You don't know who they were made payable to?

THE WITNESS: I don't know whether they were notes that were owed to one of Marx's companies or to himself and what agreement he gave it. I just have no knowledge.

THE COURT: Were any notes held at that time, that is on August 22, 1967, by any of the Tower entities?

THE WITNESS: I don't know, your Honor. I just don't recall.

Q Mr. Fugazy, do you know if you had any discussion at all with Diners' about either the note for 900,000 or the settlement of 265,000? Do you recall that?

A I don't think I did.

THE COURT: Mr. Fugazy, were those notes of $900,000 notes payable to Travel Credit Corporation?

THE WITNESS: They may have been, your Honor. I'm sure Mr. Marx can answer. I just don't know. I would be happy to answer if I could.

THE COURT: Do you recall any settlement on notes payable to Travel Credit Corporation--

THE WITNESS: That was Mr. Marx's company.

THE COURT: --which was made in August of

1967?

THE WITNESS: I don't recall, your Honor.

(Defendants' Exhibits J and K marked for identification.)

Q Mr. Fugazy, I show you a document entitled Defendants' Exhibit J, bearing a date of February 26, 1963, and I ask you if you have ever seen a copy of that before (handing).

A I may have. I haven't seen it for a long time. I just don't recall. Can I see if I signed it?

Q Yes, please look at the signature page.

A Yes.

Q That is your signature on the signature page?

A Yes.

Q Would you please say who the other signatures are if you recognize them?

A My brother's and Jerome Riker, who was president of Tower.

Q What signature is that that appears under Fugazy Travel Bureau, Inc.? Is that yours as well?

A Mine.

Q All right.

Could you just take a look at paragraph number 1--

MR. FREDERICKS: Your Honor, this document is not in evidence.

MR. SANTORA: I have not disclosed what it is at this point.

THE COURT: He has asked the witness to look at a portion of the document. Let's listen to the question.

You have asked him to look at page 2, paragraph 1; is that correct?

MR. SANTORA: Paragraph 2. I'm sorry.

Q Paragraph 2, Mr. Fugazy, page 2.

A Page 2?

Q Yes.

THE COURT: The bottom of the page.

A Yes.

Q Looking at that, Mr. Fugazy, does that refresh your recollection at all as to whether you have seen that document or discussed it with Mr. Riker of Tower or anyone from Tower?

A No.

Q You don't recall?

A No, sir.

Q Does it refresh your recollection at all whether or not you had any discussions with Tower about any claims

or demands past or present arising out of the agreement and sale of July 26, 1961 from yourself to Tower?

MR. FREDERICKS: I am going to object to that question, your Honor.

THE COURT: Overruled.

A I know of no such claims. I cannot recollect them or was ever aware of any.

Q Considering that you have signed this, Mr. Fugazy, do you have any recollection at all of the circumstances of your signing it?

A Unless I'm misreading it--

THE COURT: Do you have any recollection of the circumstances of your signing it?

THE WITNESS: No.

THE COURT: Next question.

MR. SANTORA: I would like to offer the document in evidence, your Honor.

MR. FREDERICKS: Objection, your Honor. It is totally irrelevant to these proceedings.

MR. SANTORA: It bears his signature, your Honor.

THE COURT: You will have to step up here and show me the relevance of the document.

(At the bench.)

MR. SANTORA: I think there are many grounds for the admissibility of this, your Honor, the first of which is they brought up the sale to Marx, they set a value on it of $1.5 million. They talked about a transfer from Tower to Marx, part of their whole background leading up to 1967, which bears on their claim that they were very happy in the travel business and doing very well and not looking to sell the company.

If it is allowed to stand unchallenged, it may be asserted that that company was somehow worth $1.5 million. I think I do have a right to try to--

THE COURT: It is clear from everything in the record that this company was not worth 1,500,000 cents. At least it wasn't worth that without Mr. Fugazy.

That is your problem, you see. The book value, the net worth is zero to all intents and purposes. I don't believe that counsel for the plaintiff will argue that the value of the corporate entity was never given.

I think their argument will be, and I don't want to anticipate this, that the valuable property here was Mr. Fugazy, who one person insured for $1 million and someone else insured for $5 million.

If I am wrong, I should just let Mr. Fredericks and Mr. Tolan correct me at this time.

MR. TOLAN: Your Honor, all I can say is the financials show a deficit of $794,000. The net worth of the company from a financial point of view was negative.

The question is what were they paying this money for. They were paying for Fugazy's name, they were paying for Fugazy and they were paying for the expertise of Mr. Fugazy and obviously the franchise idea. It has nothing to do with a million, five or what was paid previously because the financial statement of June 30, 1967, which is in evidence, shows that the deficit was $794,000.

THE COURT: Don't you have that actually?

MR. SANTORA: That is one aspect of it, your Honor.

The second part has to do with the next document which you have seen. For example, it seems to me it is an absolutely essential part of their case. I don't mind discussing this with the Court now. This is what I was trying to get to before.

The first document that we have been talking about, J, was the claim against Fugazy by Tower. Now, this is assigned to Marx on the eve of Diners' acquisition and Marx taking claim against Fugazy.

Yesterday he testified under oath and, if nothing else, I have a credibility point on this, the

* * * * *

date of the assignment is. Yes, 1967, assigning to somebody claims that Tower had already released in the 1963 agreement. That appears to me to raise collateral issues which have got to be directly to parties and are getting us so far away from the main issues in this matter that I just feel that we are going to get lost--

THE COURT: If anyone took us around the barn, it was you on your direct examination of this witness. Unfortunately your direct examination, according to my notes and recollection, opened the door to this Tower activity. I have several pages of notes on that subject.

MR. FREDERICKS: Your Honor, the only time that Tower was raised on direct examination, if at all, was the acquisition simply stated to show the chain of how Mr. Marx got into the picture. I didn't bring out the question of payment on direct examination, merely that Marx had acquired his interest in Tower, period. That was my only question with respect to--

THE COURT: And what he paid.

MR. FREDERICKS: That may have come out.

THE COURT: And after he recouped his investment, the Fugazys would receive a 25 per cent share each of the profits.

MR. FREDERICKS: That was to show their stock

documents until some later time.

THE COURT: The only way I will keep this out is on surprise. I regard it as relevant and material.

If you feel that you are surprised by the offer now, I would suggest that counsel may wish to hold these documents. These I regard as relevant and material to the issues in this case, whether it be the claim or counter-claim or both. I tell you that now.

What I would suggest is that you may want to put these in evidence now, but not read from them, nor show them to the jury. I will permit them to go in, but you are not to read from them or show them to the jury before Monday.

MR. FREDERICKS: Your Honor, since I am surprised sufficiently to the point that I am not even prepared to make a proper objection to the documents, I would request your Honor--I recognize your Honor's indication--to delay that until I have had a chance to study the documents and can intelligently respond to the Court and be of some assistance to the Court and its ruling.

MR. SANTORA: That's right, especially if I am not going to do anything with them.

At the risk of angering your Honor, I only want to say that there was no intention of withholding this.

been passed before we could have done our merger months ago, and he was very happy about it.

Then at the en of one of the board meetings, October or November, when the merger was to be approved, Mr. Herd in an ad hoc committee after the meeting said the reas he didn't want the merger to go through right then was he wanted to find out about a tax bill that President Johnson had on his desk to sign which would give a tax-free status or something, and the bill was signed a few days later.

Then when that was done, he would say it would be done at the next meeting. It just never happened until finall it did happen in 1970.

Q Mr. Fugazy, since you do know and we have established that the Continental takeover did take place, can you tell me when is the first time anybody ever said to you that it was going to take place at any particular time?

A You mean the final --

Q I am saying when is the first time that anybody --

A No one knew it.

THE COURT: He just answered your question. He said nobody knew it.

Let's go on.

A I was home one night and they called me on the phone and said it is in the newspaper, Continental tendered for us.

* * * * *

engaging in any negotiation with Diners in 1967, had you heard from any other source any rumors about a possible Continental takeover of Diners Club?

A No, sir.

Q You never had?

A No, sir.

Q Did you have discussions with Mr. Bloomingdale about the potential Continental takeover of Diners' Club in June or July of 1967?

A In July.

Q Was it the result of those conversations that you happened to meet Mr. Herd on the date that we spoke about?

A I don't know if it was a result of that. I did meet.

Q Do you recall mentioning that in your conversation with Mr. Herd Mr. Herd said something to the effect, "You don't court a girl unless you marry her"?

Do you remember that?

A Yes, sir.

Q Do you recall reporting that comment to Mr. Otto Marx after the meeting you had with Mr. Herd?

MR. FREDERICKS: I think counsel has confused the meetings here. We started out talking about a meeting in October of '67, and now the comments he is referring to,

to my recollection, took place at the later meeting in connection with the give-up of the cash.

THE COURT: Overruled.

A I recall Mr. Herd making that comment, and I recall mentioning that to Mr. Marx.

MR. SANTORA: I would like to read into the record from the witness' deposition in this case, the sworn testimony of July 18, 1974, beginning at page 269 -- I am sorry, 267 line 24 through 268, line 18.

"Q How many times prior to the acquisition of Fugazy by Diners did you meet or talk to Victor Herd?

"A I think it was just once."

MR. FREDERICKS: Your Honor, I am going to object. Unless I am lost -- I have been given a copy with a missing page. I don't have page 268.

THE COURT: Neither does the Court. If you are reading from 268, I would like to see a copy of it.

(Document handed to the Court.)

MR. SANTORA: May we have the first part of the deposition read back so we know where we stand.

(Record read.)

BY MR. SANTORA:

"Q How about Harold Johnson?

"A I believe it was the same time.

"Q Do you recall where that meeting was?

"A I think we went down -- Bloomingdale took either me alone or Marx down to Continental to meet --

"MR. HARRIS: I would like that last question answered a little more clearly. Do you mean you certainly went and Mr. Marx may have accompanied you?

"THE WITNESS: Right.

"Q Do you recall whether at that meeting either Mr. Herd or Mr. Johnson said anything to you about Continental taking over Diners'?

"A No, they did not."

Now, Mr. Fugazy, do you recall testifying under oath to those answers in response to those questions?

A Yes.

MR. SANTORA: I would fully like to read from the witness' deposition in the same transcript, your Honor, appearing at page 274, line 5 through 13 as follows:

"Q At that meeting that took place with Mr. Herd and Mr. Johnson prior to the acquisition of Fugazy Travel by Diners', did you or Mr. Marx, if he was present, ask Mr. Herd or Mr. Johnson about Continental possibly taking over Diners'?

"A No.

"Q Was that subject discussed at the meeting at all?

"A No."

Mr. Fugazy, did you testify under oath to those answer in response to those questions?

A I did.

Q Do you also recall at this trial you testified about a meeting you say was held at the Fairmont Hotel in June of 1968?

A Yes, sir.

Q Do you recall on Thursday you testified about some other acquisitions and projects that were to be taken care of at the time of this June 1968 meeting that you told about?

A They were mentioned to me. I don't think they were told to be taken care of. They were mentioned to me.

Q By the way, after that meeting with Mr. Herd in San Francisco that you have described, did you bring up the topic of that meeting at any subsequentboard of directors meeting for Diners' Club?

A At the board meeting per se?

Q Yes, sir.

A No.

Q And did anyone else bring up that subject for discussion at the meetings of the board of directors of

MR. FREDERICKS: Yes.

MR. SANTORA: Yes.

THE COURT: Very well. All right.

Q Mr. Fugazy, you have before you a document entitled Defendants' Exhibit J for identification.

A Yes.

Q I don't recall whether you identified your signature the other day.

Would you please look at the signature page.

A Yes, sir.

Q Is that your signature, sir?

A It would appear to be.

Q Is there a reference to the signature of Louis Fugazy as well?

A Yes.

Q And does that appear to be his signature to you?

A Yes, sir.

MR. SANTORA: At this time, your Honor, I offer Defendants' Exhibit J into evidence.

MR. FREDERICKS: Objection, your Honor.

THE COURT: State your grounds.

MR. FREDERICKS: Your Honor, we have supplied the Court with a lengthy brief on the subject. This is one

of the documents covered in that brief. We feel these documents are totally irrelevant. They involve collateral matter. They are certainly more designed to get us off into tangents than the issues here before the Court.

For the grounds set fully in our brief, we object to the introduction of this document.

THE COURT: Overruled.

J will be received.

Q Mr. Fugazy, can you identify the document that is before you marked--

THE COURT: Wait a minute. Can I have the document, please, sir?

(Defendants' Exhibit J for identification received in evidence.)

THE COURT: You may proceed, sir.

Q Mr. Fugazy, can you identify for the jury what Defendants' Exhibit J in evidence is?

A I believe this was the agreement that Mr. Marx, my brother and myself or Tower entered into whereby we agreed to hold Tower harmless for any of the shares my brother and I were to get, and they were holding us harmless subject to such shares being escrowed prior to the sale of Fugazy by Tower to Mr. Marx's company, Travel Marx. I believe this is basically what the document is.

Q Would you explain what you mean by hold harmless?

A Well, under--when my brother and I had sold our company, we were to get a lot of shares from Tower over a period of years. When Tower--when Tower decided to accept Mr. Marx's offer, we agreed to leave Tower off of that obligation and Tower left us, I guess, harmless or whatever it was, and we agreed to keep I think 20,000 shares or 10,000 shares in escrow until all final claims were settled, which they were eventually, and the stock was returned to us.

Q When you say when all the final claims were settled, what claims are you talking about?

A I guess there were certain representations made when we sold the company, and those representations were carried over into--with Mr. Marx and finally we were held--everybody released everybody and the shares came to us eventually, in a couple of years or something.

Q Are you finished?

A Yes, sir.

Q You say representations were made when you sold the company to Tower.

Do you know what representations they were or what these claims were that you were being held harmless

from?

A No, I don't.

MR. FREDERICKS: Objection, your Honor, totally irrelevant to these proceedings.

THE COURT: He has answered the question. He doesn't know.

Let's get on with it, counsel.

Q Mr. Fugazy, do you recall last Thursday I asked you some questions about some negotiations going on in 1966 between Fugazy Travel and company called Pierre Busetti?

A Yes, sir.

Q Mr. Fugazy, did you call or did you have someone call Mr. Piscatella who was formerly involved with the Pierre Busetti company? Did you call or have anyone call Mr. Piscatella last Friday after Court?

A I certainly didn't; no, sir. I never directed anyone.

Q Did you ask your secretary to call Mr. Piscatella?

A No, I asked my secretary to see if she could find any correspondence because you took me by surprise. I didn't know what it was about.

Q Whether you called or anybody called, did you speak at all to Mr. Piscatella after we left Court here

restoration of asphalt highways.

Q Mr. Summerlin, are you any relationship to the other plaintiff in this action, Mr. Otto Marx, Jr.?

A Yes, sir, he's my step-father.

Q Have you ever been associated with a company known as Marx & Co., sir?

A Yes, I have.

Q In what capacity?

A As a vice president and a director.

Q From what period of time, sir?

A From May 1963 until February 1975.

Q Did you ever have a stock interest in Marx & Co., sir?

A Yes, I do.

Q Were you ever employed at Fugazy Travel, sir?

A Yes, I was.

Q What period?

A From May 1963 until the sale to Diners' in 1967.

Q Were you an officer and director of that company, sir?

A Yes, I was.

Q What position did you hold as an officer?

A I was vice president of special project.

Q Mr. Summerlin, did you have a stock interest in Fugazy Travel in 1967?

A Yes, I did.

Q What was that interest, sir?

A 10 per cent.

Q 10 per cent of the outstanding stock of Fugazy Travel; is that correct?

A That is correct.

Q Mr. Summerlin, while you were employed at Fugazy Travel, did you have any conversations with anyone relating to the possible acquisition of Fugazy Travel by Diners' Club?

A Yes, I did.

Q Who was that, sir?

A With my father.

Q When did those conversations take place?

A They took place fairly continually during the entire time of all the discussions. We were with each other on a daily basis.

Q Can you give me a period of time, Mr. Summerlin, a month, a year?

A Oh, certainly four, five months; four months.

Q What year, sir?

A 1967.

Q Can you tell us, please, what Mr. Marx told you at that time, sir?

A My father told me that Diners' and he and Bill were negotiating towards an acquisition or a merger.

Q With whom, sir?

A I know that--he told me that they had been talking with Mr. Bloomingdale.

Q Mr. Bloomingdale of what company?

A Diners' Club.

Q You just mentioned a person named Bill.

Can you give us his full name, please?

A Excuse me. Mr. Fugazy.

Q Did anyone ever discuss with you the takeover of Diners' Club by Continental Insurance?

A Yes.

Q Who was that, sir?

A My father.

Q What did he tell you at that time, sir?

A He told me that in the discussions that he was having, that there was a probability that Continental would totally acquire Diners' Club.

Q Did he tell you the source of that information?

A Yes, he did.

Q Who was the source of that information?

A Mr. Bloomingdale.

Q Did you discuss the matter with anyone else, sir?

A I was party to--other than Bill--excuse me. Other than Mr. Fugazy and my father?

Q You have just been telling us about your discussions with Mr. Marx.

Would you tell us: Did you have any discussions with anyone other than Mr. Marx?

A I was present during discussions that my father had with Bill Fugazy.

Q Mr. Summerlin, getting back to the Fugazy Travel Company.

Did there come a time when Fugazy Travel was acquired by Diners' Club?

A Yes, sir.

Q When was that, sir?

A In 1967, sir.

Q Did you receive any part of that purchase price?

A Yes, sir.

Q What did you receive?

A I received approximately 5,700 odd shares of Diners' Club stock.

Q Was that stock freely saleable to the public or

was it restricted in any way?

A No, sir, it was restricted stock.

Q Did there come a time, Mr. Summerlin, when a request was made to register the stock that you held in Diners' Club?

A Yes, there was a request for registration.

Q When was that request made and by whom, sir?

A That was made in I believe 1969.

Q Do you know who made it, sir?

A The reason I was having difficulty thinking is the request was made for F.T. Ventures, which included my stock.

THE COURT: I didn't hear the answer.

THE WITNESS: Excuse me. The request I believe was made for F.T. Ventures, which included my stock.

Q Mr. Summerlin, I show you what has been marked Exhibit 27 in evidence and see if that refreshes your recollection as to when and who made that request for registration (handing)? Does that refresh your recollection, sir?

A Yes, sir, it does.

Q Would you tell me with your recollection refreshed when that request was made and by whom?

A On April 16, 1969 by my father.

Q Individually or on behalf of the company or both?

A On behalf of F.T. Ventures.

Q Thank you.

Did there come a time, sir, when you sold your Diners' Club shares?

A Yes, sir.

Q When was that, sir, and to whom?

A It was sold in approximately March of 1970 under the tender offer to Continental.

Q You tendered your shares to Continental Insurance?

A Yes.

MR. FREDERICKS: I have no further questions of this witness, your Honor.

THE COURT: You may inquire, Mr. Santora.

MR. SANTORA: Thank you, your Honor.

CROSS EXAMINATION

BY MR. SANTORA:

Q Mr. Summerlin, you are a plaintiff in this case, is that correct?

A Yes, I am.

Q Are you claiming in this case that Diners' failed to use its best efforts to make effective a

registration statement for your shares in 1969?

A Yes, sir.

Q Can you tell me what you know about the efforts that were used and what was done and what was not done, if you would, please?

A Well, I know that my father expended a great deal of time and effort in trying to get the stock registered. I personally, since we were working very closely together was not personally involved to any great extent at all in this.

Q Mr. Summerlin, you have before you Plaintiffs' Exhibit 27, which appears to be a letter from Mr. Marx dated April 16, 1969, Diners' Club.

Have you seen a copy of that letter before today, sir?

A I'm sure I saw it when it went out.

Q To the best of your knowledge, is that the letter whereby the request was made for Diners' to register your shares and Mr. Marx's shares and the Fugazy shares?

A Yes, sir.

Q Did you discuss the sending of this letter or the contents of this letter with your father, Mr. Marx, at or about the time, April of 1969?

A I'm sure we did.

* * * * *

A Yes, sir.

Q Can you recall precisely what it was he said to you and when?

A No, I cannot recall precisely what he said to me.

Q Do you recall what your father said to you, or Mr. Marx said to you, and when?

A I can recall what our discussions concerned. I cannot recall precisely what he said to me.

Q Did either your father or Mr. Fugazy, prior to October1967, ever give you or ever say to you that there was a specific date for this takeover to happen?

A No, not a specific date.

Q Do you know when, if ever, you heard a specific date that this takeover by Continental was to take place?

A I don't believe I ever heard a specific date.

Q When you say you never heard a specific date, how far up do you take that from 1967?

A How far from when?

Q Well, let's see. When you say you never heard a specific date, does that mean right up to the present, Mr. Summerlin?

A (No response.)

Q Let's say February 1970, when the takeover

happened --

A Correct.

Q -- prior to February of 1970, did you ever hear a specific date for the takeover?

A No, not a specific date.

Q Did you have occasion to discuss with your father the Diners/Fugazy deal, the terms of the deal, and the merits of the deal, in 1967?

A Yes, sir.

Q Do you recall when it was first told to you, that there was a possibility that there might be a Diners' acquisition of Fugazy Travel?

A Again, a specific date?

Q No; do you remember when it was first mentioned to you that there was to be some -- a possibility that Diners' would acquire Fugazy travel? When was the first time you learned that?

A Not specifically. This is what you seem to be asking me, and I don't remember a specific date.

Q Perhaps I can rephrase that. Do you know when you first leanred that your father was talking to Diners' Club in 1967?

A Again, I don't recall a specific date that these events occurred. We worked together on a daily basis and

* * * * *

Q Did you ever hear in any stage of the negotiation that he was opposed to making this deal with Diners'?

A During the negotiations there were differences, but that is not necessarily opposition. These differences were obviously worked out.

Q I am saying to you: Did you ever hear from him that he was opposed to making the deal with Diners'

A No.

Q Did he always indicate to you that he looked forward to making that deal with Diners'?

A I assumed it.

Q Did he ever say that to you?

A Again, we were together on a daily basis every day, and many nights. We weren't meeting now and then or talking on the phone, I mean we were constantly together.

Q Did you ever discuss this with Mr. Fugazy, as to whether he was in favor of the deal or not?

A No, I did not.

Q Do you know today whether or not Mr. Fugazy was in favor of that deal in '67?

A I assume that he was.

Q Did your father ever tell you during all this time you were talking with him that he wasn't going to make this deal, the 1967 deal, unless he could be assured that

Continental was going to takeover Diners' Club?

A At that point he was not that emphatic. He was very strong about it. At that point he believe it was going to happen.

Q Would you raise your voice, please?

A Yes, I am sorry. At that point he wasn't that emphatic about it at the closing. They were there, and he knew it, and if they hadn't been there he wouldn't have been there, and so he was satisfied.

Q Well, did he ever say to you, Mr. Summerlin, that he wasn't going to make that deal unless he could be assured that Continental was going to do a takeover?

A On this one? We are talking about 1967, the sale of assets by Fugazy Travel to Diners Club.

A He didn't say that.

Q Did he ever say to you that he thought this was a good deal -- in other words, what Fugazy Travel was giving up for what Diners' was giving up?

A Yes, but that is something else again. He didn't say because he didn't believe that-- in other words, again, we are working together on a daily basis in close communication. He didn't say "I am not going to do it today if Continental doesn't take over by next Thursday."

He knew what their position was on the acquisition,

and he was secure in his position of what there was.

Q Well, Mr. Summerlin, did Mr. Marx ever say to you "That this deal is a good deal, and we can make this deal, and we don't care whether there is a Continental takeover or not"? I am talking about 1967, sir.

A I know you are. Not in those words.

Q Did you feel at that time from your conversations with your father, from anything you heard, that this was a condition to that deal, that there had to be a Continental takeover or he wasn't going to make the deal?

MR. FREDERICKS: I object.

THE COURT: Sustained.

Q Did anybody, either Mr. Fugazy or Mr. marks, at any time prior to the closing in 1967 ever say to you in any way that they weren't going to go through with this deal unless tere was a Continental takeover?

A Again, this is in '67. No, no one said directly to me in those words that they felt that way. That doesn't describe their feelings, that answers your question.

Q Did Mr. Marx or Mr. Fugazy ever say to you that this was a good deal on its own terms without reference to any takeover, that it was a deal that could operate on its own, and a good deal for Fugazy Travel totally apart from a Continental takeover?

A When you say totally apart from a Continental takeover do you mean apart from all their support that they were contributing, because that was a critical factor to this deal?

Q Mr. Summerlin, did you ever tell your father or Mr. Fugazy what your views were on the merits of the deal, namely, what appears in the purchase agreement, the consideration given up by Diners' and the consideration received by Diners' from Fugazy Travel? Did you ever tell them whatyou thought about the merits of that deal?

A I wouldn't talk to them on the merits of that deal based on what you just said, I am sorry.

There is a lot more involved. The two agreement just put together -- or the agreement just put together what you are thinking and how you are going to do it.

MR. SANTORA: I would like to read from this witness' deposition in this case dated August 27, 1973, beginning at page 42, line 15, and ending at page 45, line 6:

"Q What did Mr. Marx say that Mr. Bloomingdale had told you?

"A Over a period of time that Continental was taking a greater and greater interest financially in Diners and that the end result was going to be a total acquisition.

"Q That is what Mr. Marx told you?

"A Correct.

"Q That Mr. Bloomingdale had told him?

"A That is correct.

"Q Did Mr. Marks ever indicate to you prior to the acquisition that unless the Continental acquisition was going to take place he would not agree to sell Fugazy Travel Bureau to Diners?

"MR. FREDERICKS: You are asking him if he told him that specifically?

"A I honestly can't recall because -- well, to the best of my knowledge he didn't prior to the acquisition. I don't believe he did. I don't believe -- I don't think he was thinking along those lines.

"Q Mr. Marx" --

THE COURT: Go to line 17.

BY MR. SANTORA:

"Q Did he tell you that he was in favor of the acquisition?

"A Yes.

"Q And did he give you reasons for that?

"A Yes.

"Q And what were those reasons?

"A Basically, in an overall picture, thatthis gave us basically an opportunity to sell Fugazy to a company

that at that time was presumed to be reasonably sgrong and an excellent vehicle to use what Fugazy had already established. There is no better merger than one where both companies have something to contribute, and this was a perfect fit, and it looked like a very good deal.

"Q Did he say that he felt you would be making a profit on that deal?

"A I don't believe he ever said that.

"Q Did you get that impression that that was one of the reasons he was in favor of it?

"A Oh, yes.

"Q Did he suggest to you that the acquisition by Continental of Diners' was a necessary part of his agreeing to the acquisition of Fugazy Travel by Diners'

"A No, not originally.

"Q Did he mention that as part of the deal at all?

"A Yes. That was part of the deal. But the way the deal was originally structured, whether they took over or not originally, as I recall, it wasn't that keen a problem because we had our deal geared into Fugazy and what Diners' could do with it. I don't think this was that big an item at that point.

"Q Continental was not directly involved in the picture at that time, you were more concerned with Diners'

acquiring full travel, is that correct?

"A Yes. Well, they were there. But this deal was set up originally that it would operate on its own."

Do you recall testifying under oath to those answers in response to those questions, Mr. Summerlin?

A Yes, sir.

Q Mr. Summerlin, on direct you mentioned at one point you were the owner of 10 per cent of the stock of Fugazy Travel Bureau?

A Yes, sir.

Q Do you recall when you became the owner?

A No, sir.

Q Do you know how much it cost to become the owner of 10 per cent of the stock of Fugazy Travel?

MR. FREDERICKS: I object. That is totally irrelevant, your Honor.

THE COURT: Overruled.

Did you buy the stock or was it given to you as a gift?

THE WITNESS: I purchased it.

Q Do you recall how much you purchased it for?

A As I recall, I believe it was approximately $5,000.

THE COURT: When was that?

THE WITNESS: I am not positive, but I think it was

* * * * *

your own account?

A From '63 to '67, I can't recall. Yes, I think so.

Q And when you acquired companies did you later resell them at times between 1963 and 1967?

A Possibly.

Q Mr, Summerlin, would you say that that was one of the chief areas of business activity of Marx & Co. between 1963 and 1967?

MR. FREDERICKS: What was, your Honor?

MR. SANTORA: The buying, the acquiring and reselling of companies.

MR. FREDERICKS: The witness testified he bought and sold for his own account, he doesn't remember acquisitions by Marx & Company, and I think the question is objectionable and totally improper.

THE COURT: Overruled, if you can answer it.

A I would say most of our efforts in the time from 1963 to 1967 were spent on the Fugazy Travel Bureau.

Q Mr.Summerlin, let us forget Fugazy Travel for a second. Between 1963 and 1967, was Marx & Co. operating any companies at all?

A Yes, sir.

Q How long had they been operating them in 1967,

if you know?

A I would have to check the companies, if there were more than two, and find out how long we had been involved. I can't accurately answer that question.

Q Can you tell me how many officers and employees did Marx & Co. have besides yourself and Mr. Marx?

A We had a secretary and an accountant.

Q During the period of 1963 to 1967, did you and/or Mr. Marx or both of you together have occasion to investigate or make inquiry into any rumors of pending acquisitions or proposed mergers of companies?

A No, sir.

Q You never made any such inquiry during that period?

A On a rumor?

Q Yes.

A No, sir.

Q If you did hear a rumor about a forthcoming possible acquisition, was there anything that you did in the normal course to check it out?

MR. FREDERICKS: I object, your Honor.

THE COURT: Sustained.

Q Mr. Summerlin, do you consider yourself to be an experienced investor?

A Yes, sir.

Q A sophisticated investor?

A Yes, sir.

Q Do you know, Mr. Summerlin, between the period of 1963 and 1967 how many companies were acquired by Marx & Co.?

A No, sir.

Q Do you know if any of those companies -- if any companies were acquired between 1963 and 1967, whether any of those companies are retained today by Marx & Co.?

A I can't answer either.

Q Is it fair to say, Mr. Summerlin, that the business of Marx & Co. was to pick up a company and then see if it could be improved and later resold to a potential purchaser?

A Yes, sir.

Q Did you generally try to sell at a higher price than the price that you purchased the company for?

A Absolutely.

Q Can you tell us in the normal course of your business activities what, if anything, you and Mr. Marx would do to improve a company and to have it ready for sale at a higher price?

MR. FREDERICKS: I ahve to object to that question, your Honor.

THE COURT: Sustained. If you want to talk about

* * * * *

A As I recall, I believe my father met Mr. Sindona at a cocktail party, and I believe over a drink they started discussing what each was doing, decided to carry it a little further. I think that's how it got started. I don't believe anybody called anyone.

Q You now have before you Defendants' Exhibit H, and I ask you if you recall seing that document before.

THE COURT: That is for identification. Let's keep the record straight.

MR. SANTORA: H for identification.

THE COURT: Right.

Do you recall seeing that document before, sir?

THE WITNESS: No, but I'm sure I must have.

Q Do you recall discussing the contents of this memorandum with Mr. Marx?

A I know we discussed it. I don't recall any specific meeting.

Q Did you ever discuss any of the contents of this memorandum with any of the people at Pierre Busetti?

A Not to my knowledge.

Q If you look at paragraph 2, Mr. Summerlin, was there any discussion between you and Mr. Marx of the numbers that are shown in that paragraph?

MR. FREDERICKS: I object, your Honor. This is marked for identification.

MR. SANTORA: I am laying a foundation.

THE COURT: Overruled.

Did you discuss the substance of what is contained in that paragraph, particularly the number or numbers which are there?

THE WITNESS: I'm sure that we discussed everything that is in here, but I--as I say, I don't recall the negotiation that clearly.

Q When you say "we," who are you referring to?

A My father.

Q How about Mr. Fugazy, did you discuss this with him?

A I don't recall.

MR. SANTORA: Your Honor, at this time I renew my offer of that exhibit into evidence.

MR. FREDERICKS: Objection, your Honor.

THE COURT: Sustained.

Q Mr. Summerlin, when you were involved in your duties at Fugazy Travel in 1963, did you have any occasion to receive a report from the accounting firm of J.K. Lasser?

MR. FREDERICKS: I am going to object, your

* * * * *

A He was president and chairman of the board.

Q You said that these meetings took place in the summer of 1967; was that your testimony?

A Yes, that's correct.

Q Can you tell me what was discussed at these meetings, sir?

A There were details of the purchase or merger of Fugazy Travel and Diners' Club.

Q Do you recall any particular meetings or discussions or conversations with the representatives of Diners Club prior to the acquisition in October of 1967 directly related to the proposed Continental takeover?

A I'm sorry?

Q Do you recall any meetings, discussions, or conversations with any representatives of the Diners' Club, prior to the acquisition in October of 1967 concerning acquisition of Diners' Club by Continental?

MR. SANTORA: I object.

THE COURT: Sustained.

Q Do you recall any particulars concerning--that were discussed in these meetings with Mr. Bloomingdale, Asch, Hays or Flug?

A Yes. Specifically, I remember one meeting with Mr. Bloomingdale.

Q Where did that take place, if you can recall?

A In an automobile on a route back to New York from a meeting down in New Jersey.

Q You were returning to New York from a meeting in New Jersey, sir?

A That's correct.

Q Where in New Jersey was that?

A I'm really not certain. I thought it was down around Summit. I'm not certain.

Q Can you tell me approximately when that was?

A Yes. That was October of '67.

Q Do you recall who was in the car at that time, sir?

A Yes. There was my brother--

Q Your brother William Fugazy?

A My brother William Fugazy, Mr. Asch, and Mr. Bloomingdale.

Q Can you recall what was said, sir?

A The gist--I don't recall the exact conversation, but the gist of the conversation was that my brother had passed some remark to Mr. Bloomingdale about the takeover of Diners' Club by Continental and he said that it was imminent.

Q Who is he, sir?

A Mr. Bloomingdale.

Q Can you tell me who on behalf of Fugazy Travel handled most of the negotiations between Fugazy Travel and Diners' Club?

A Mr. Marx and my brother William.

Q Did they keep you informed as to the status of the negotiations and discussions?

A Yes, they did.

Q Do you recall what they said to you about their meetings?

A Well, there were so many meetings, really, to bring up some specific point, I can't tell you unless you refresh me--

Q Do you recall any specific conversations concerning the acquisition of Fugazy Travel by Diners' Club?

A Well, we initially started out and it looked like an interesting proposition made here for us to merge. We at that time were in the process of really accelerating our franchise program.

I think probably the only serious question that came to our mind was their capability, their financial status to carry on for an expanded program.

Q They, being who, sir?

A Diners' Club.

* * * * *

A He explained to me as best he could what the conversation would be of the stock, of the paper stock that we were then holding, if it were to be converted into Continental's stock. It was a schematic really of how many shares of Diners' would be converted into Continental.

Q Those discussions were with Mr. Marx prior to your discussion of what has been now marked 22-A for identification?

A That is correct.

Q In evidence?

A Right.

Q Do you presently own any shares of Diners' Club stock stock, sir?

A No, I do not.

Q Would you tell me, please, to whom you sold those shares, if anyone?

A Yes. To Continental Insurance Company.

THE COURT: Did you sell them or did you tender them?

THE WITNESS: We tendered them, I should say.

Q When was that?

A That was in 1970, February or March.

Q Mr. Fugazy, I show you Exhibit 27 in evidence, which is a letter dated April 16, 1969, signed by Otto

Marx to Diners' Club, Inc., and ask you whether your signature appears on that letter?

A Yes, it does.

Q Were you aware of that letter being sent, sir, prior to its being mailed?

A Yes.

MR.FREDERICKS: I have no further questions of this witness, your Honor.

THE COURT: You may inquire, Mr. Santora.

CROSS EXAMINATION

BY MR. SANTORA:

Q Mr. Fugazy, when did you start working at Fugazy Travel?

A 1937.

Q Were you working at Fugazy Travel continuously from 1937 through 1967?

A Except for four years in service.

Q Through most of that time were you employed full time by Fugazy Travel?

A Yes.

Q Were you an officer of Fugazy Travel in 1967?

A Yes.

Q What was your title, sir?

A Vice chairman of the board.

* * * * *

Q Do you know who first spoke to you or how you first learned of the terms of the proposed deal or agreement between Diners' and Fugazy Travel?

A Either my brother or Mr. Marx.

Q Now, do you recall what it was that either Mr. Marx or your brother told you about the proposal itself,the terms of the proposal?

A No. Not at this point. I don't recall the initial presentation per se, no.

Q Do you recall that when you first heard about the proposal, whether you were in favor or it or whether you were against it?

A Sounded interesting initially.

Q And did anyone else express their feelings to you, Mr. Marx, or Mr. Fugazy as to whether they were interested in the proposition?

A Initially, yes.

Q What did they say?

A Thought it was interesting.

Q Is that true for both of them, Marx and Fugazy, your brother, William Fugazy?

A I don't believe we would have pursued it if it wasn't interesting to us.

Q Did you have any discussions with Mr. Marx or

Mr. Fugazy as to exactly how this deal might be--this deal or agreement with Diners' might be beneficial, specifically how it would be beneficial to Fugazy Travel?

A Yes.

Q Do you recall with whom you discussed it?

A Just with Mr. Fugazy and Mr. Marx.

Q Do you recall what you said to them and what they said to you?

A Well, we knew at that particular point in time that American Express shortly before had gone into the credit card business, and then on one side of the coin it was obvious that for Diners' to acquire a travel organization such as ours would be interesting, and again on our side of the coin it was interesting for us to become associated with a credit card organization in that it would allow us that much more exposure to commercial accounts and the public in general by having the capability of selling our travel on a credit basis.

Q Do you recall when, if ever, you heard for the first time that there was a potentiality or possiblity that Continental might take over the Diners' Club?

A No, I cannot tell you the specific time that it was brought to my attention. We were all aware of them having convertible debentures when we went in, when we were

negotiating. We knew that Continental had a very strong position, obviously.

Q Well, do you know when if ever anyone from Diners'or Continental said there was a possibility of a takeover--

A Yes.

Q Said to you?

A Yes.

Q When was that?

A October 1967.

Q Well, do you recall that this was before or after the acquisition of Fugazy Travel by Diners' Club, sir?

A I honestly can't answer you, because the signing and the time of this joint meeting were within a two-week span, as it seems to me, and I don't recall which came first.

Q Well, is the first time you heard about this possibility at the time you were discussing the amendments to your employment contracts?

MR. FREDERICKS: I'm going to--

THE COURT: Sustained. I think the question can be improved.

Q Is the first time you heard about the possibility

that Continental might take over Diners', was that at or about the time that you were negotiating or discussing the amendments to your employment agreements?

MR. FREDERICKS: Your Honor, I don't know. The first time he heard it from whom, is my problem.

THE COURT: From anyone.

A I heard it in the fall of 1967 and then, of course, I heard it again. And as you showed me the documentation before, before we changed our initial employment contract I had seen these ratios. So that is at least three occasions.

Q You didn't see the ratios until the fall of 1968?

A That's correct.

Q So using that as a benchmark, can you tell us with any more specificity than that when is the first time you heard anyone at Diners' or Continental was saying there was a possibility that Continental might take over Diners'?

A October, 1967.

BY THE COURT:

Q Who was it that told you that?

A Mr. Bloomingdale.

Q Where was that?

A In an automobile, your Honor.

Q Who was present in that automobile?

A Mr. Asch, Mr. Bloomingdale, my brother William, and myself.

Q That was the ride coming back from New Jersey?

A That's correct, sir.

MR. SANTORA: Your Honor, I'd like to read from the deposition of this witness.

THE COURT: You may.

MR. SANTORA: I don't have an extra copy.

THE COURT: We will listen. Tell counsel what line and page you are reading from.

MR. SANTORA: The deposition of September 5, 1974 in this action at page 131, line 19, through page 132, line 10.

"Q Who is the first person to mention this to you, that possibility of Continental taking it over?

"A I don't know if it was my brother or Bloomingdale or it was in a mutual discussion.

"Q Do you recall specifically what they said to you, whoever it was?

"A Yes. That our--that the takeover looked, as I recall, relatively imminent, and that it would obviously enhance our stock in Diners' Club.

"Q Was this after the closing when Diners'

purchased Fugazy Travel?

"A Yes.

"Q You are sure of that?

"A That it was after the purchase?

"Q Yes.

"A Yes."

BY MR. SANTORA:

Q Mr. Fugazy, do you recall testifying under oath to those answers in response to those questions?

A I do.

Q Do you recall ever hearing from anyone that the Continental takeover was supposed to take place on any definite date?

A No.

Q You never heard that?

A A specific date, no.

Q With respect to the employment contracts that you discussed before and the amendments that you were discussing in 1967, do you recall testifying to that a moment ago?

A Yes.

Q Do you recall who first suggested that these amendments might take place?

A No, I do not.

* * * * *

Q Beyond Mr. Marx, anyone else from Diners' Club or from Continental?

A No.

BY MR. SANTORA:

Q Mr. Fugazy, on your direct examination you were asked some questions about the registration statement that was to be filed in 1969 for your stock, by Diners' Club.

A I don't follow you.

Q Do you recall thatin 1969 you and your brother and Mr. Marx requested Diners' to file a registration statement to register your stocks with the Securities and Exchange Commission?

A Yes, I do.

Q Do you know anything about what was done by Diners' with respect to that registration statement?

A I know that it was filed. At one point in time I saw the registration statement.

Q Do you have any knowledge or any information about what was done prior to the filing or what was done after the filing by Diners'

A What was done prior to it?

Q Yes.

A No, I don't.

Q Do you have any information as to what was done by Diners' after it was filed in trying to get the statement effective?

A Yes. As I recall it was withdrawn.

Q No. My question, Mr. Fugazy: Do you recall anything that was done by Diners? Do you have any information as to the activities that were going on, if any, between Diners' and the SEC after the filing of the registration statement?

A No.

Q All right.

Mr. Fugazy, in 1967, just prior to the Diners' acquisition of Fugazy Travel, do you know if Fugazy Travel was receiving financing from Mr. Marx or one of his companies?

A I don't recall.

Q Do you recall whether Mr. Marx or one of his companies was extending financing to Fugazy Travel in the whole period of 1963 to 1967?

MR. FREDERICKS: Your Honor, I object to that as clearly being beyond direct.

THE COURT: Overruled.

A You are asking me was there interim financing?

Q Yes, sir.

THE COURT: By Mr. Marx or any company he owned.

A Yes.

Q Was this financing necessary to pay for the operations of Fugazy Travel?

A No.

Q Was any of this financing necessary to pay any current obligations or liabilities of Fugazy Travel in that period?

MR. FREDERICKS: I am going to object to the question, your Honor.

THE COURT: Sustained as to form.

Q Do you know what the money was used for that came from Mr. Marx or his companies by Fugazy Travel?

A Yes.

Q What was it used for, sir?

A We handled a large number of commercial accounts in which we would extend credit. We always needed cash, reserves and cash up front. That is the nature of our business.

Q What exactly did you need the cash for?

A Well, if a commercial account bought $100,000 worth of travel from us today, we would pay the airlines within a 7-day period and the account would not pay us in man, many cases for a 30-day period. That is the whole nature of our commercial business.

Q You were obligated to pay the airlines on your air tickets within a 7-day period, you are saying?

A Yes.

MR. FREDERICKS: Your Honor, I move to strike the question. The witness hasn't testified he was obligated to pay anything.

MR. SANTORA: Fugazy Travel.

THE COURT: All right. Strike the last question and answer. You go back. If you want to inquire about the company, you may do so.

Q Mr. Fugazy, to the best of your knowledge, was Fugazy Travel obligated to pay the airlines for air tickets sold within a 70day period?

A Not Fugazy Travel Bureau, per say. The rules of

IATA, to be an IATA agent, you are allowed a period of time, a grace period, in which to do your sales report. Over the years this has varied. It is run as high as 30 days and as low as 7 days. There's different periods in time in which you acting as an agent for the carrier must do your sales report and report at certain intervals. Whatever existed in 1963, I am not sure if it was 7-day or 14-day intervals. This applied to everyone.

Q Was any of the money that Mr. Marx gave in financing or his companies gave in financing to Fugazy Travel used to pay Fugazy Travel's obligations to the airlines?

A You might call it a line of credit.

Q Mr. Fugazy, was the money itself used to pay the obligations to the airlines?

A It might be. It would depend -- unless I knew a specific ase where we carried many of the major companies in New York and our agreements with them, we would not -- one of the services we extended was to carry them for a 30-day period, where as for the carrier you had to pay them at greater intervals.

Q Was any of the money put up by Mr. Marx or his company used to meet the payroll for Fugazy?

A Could be.

Q How about rent?

A I can't recall specificall how moneys were applied. It could be for rent, it could be for salary.

Q Telephone bills?

A Could be.

Q Mr. Fugazy, did Mr. Marx ever tell you at any point that he wasn't going to putup any more financing?

A No.

Q Think carefully about that.

Do you recall at any time prior to the Diners' acquisition Mr. Marx saying in any way that he wasn't going to put up any financing?

A No.

Q Was there ever a requirement, was ever a statement made to you by Mr. Marx that he wanted your personal guarantee on any further financings?

A Not that I recall.

Q Or the personal guarantee of your brother?

THE COURT: As far as you know.

A Not that I know of.

MR.SANTORA: I would like to read from the witness' deposition in this case of September 25, 1974 at page 40, line 12 through 21 as follows:

"Q Do you recall Mr. Marx ever telling you that he was not going to extend financing to Fugazy Travel without

gabr 6 L. Fugazy-cross

getting personal liability of yourself and your brother as well as the company's liability?

"MR. FREDERICKS: Personal guarantee?

"MR. SANTORA: Yes, personal guarantee.

"A Yes, but I don't recall when.

"Q Was that ever expressed in writing, sir, if you recall?

"A May have been. I don't know."

No further questions on cross, your Honor.

THE COURT: Redirect, Mr. Fredericks?

MR. FREDERICKS: Yes. I will be very brief, your Honor.

Your Honor, I am going to be reading from the deposition of this witness starting on page 130, several pages preceding what Mr. Santora has read to him.

THE COURT: Line?

MR. FREDERICKS: Page 129, line 22, the first question.

REDIRECT EXAMINATION

BY MR. FREDERICKS:

Q "Q Well, I ask you to think back and go through the period of 1968 and 1969 and I ask you if you recall any changes made in the agreement.

"A Yes.

* * * * *

A Yes, I do.

Q Mr. Fugazy, can you give us an approximate date of your meetings that you attended in South Jersey with Mr. Bloomingdale and your brother and Mr. Asch?

A October 1947 -- 1967.

Q Thank you.

MR. FREDERICKS: No further questions.

THE COURT: Any recross examination?

MR. SANTORA: Just one, your Honor.

I would like to finish where Mr. Fredericks left off on page 113 of Mr. Fugazy's deposition.

On page 113, line 9, after the last "Yes answer.

RECROSS EXAMINATION

BY MR. SANTORA:

"Q Do you recall what you discussed?

"A Specifically it would relate to the Queen Mary, yes.

"Q Just the Queen Mary?

"A I don't recall."

THE COURT: Anything else?

You may step down, Mr. Fugazy.

(Witness excused.)

THE COURT: I think this would be a good time, ladies and gentlemen, for us to take our mid-afternoon

recess. Ten minutes.

Please don't dsicuss the case among yourselves, keep an open mind on all facets of the case until it has been concluded.

Ten-minute recess. Counsel are excused as well.

(Recess.)

(In open court; jury present.)

THE COURT: You may proceed, Mr. Fredericks.

MR.FREDERICKS: I would like to call at this time, your Honor, Mr. Otto Marx, Jr.

O T T O M A R X, J R., called as a witness by the plaintiffs, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. FREDERICKS:

Q Mr. Marx, I am going to ask you to please keep your voice up loud and clear so that every juror in the courtroom can hear you, so I can hear you back here. Please try to keep your voice up and speak loud and clearly.

Where do you reside, sir?

A I reside at 2 East 88th Street, New York City.

Q What is your educational background, Mr. Marx?

A I graduated from the University of Virginia with

a B.S. degree.

Q You are going to have to keep your voice up. We can't hear you.

A I graduated from the University of Virginia with a B.S. degree.

Q What is your occupation, sir?

A I am an investment banker.

Q By whom are you presently employed, sir?

A I am self-employed.

Q What company, sir?

A Marx & Company, Inc.

Q What is your position with that company?

A I am president.

Q How long have you been president with that company, sir?

A I have been president since 1946.

Q Mr. Marx, in 1967 did you directly or indirectly own any shares in a company known as Fugazy Travel, Inc.

A Yes, I did.

Q What was your ownership in that company?

A In the beginning of 1967 it was 100 per cent ownership.

Q Were you an officer and director of that company, sir?

A Yes, I was.

Q What office did you hold?

A I was chairman of the board of directors.

Q Who were the other officers of that company in 1967?

A Mr. William Fugazy was president, Mr. Louis Fugazy was vice chairman of the board and Mr. John Summerlin was president.

Q Did there come a time in 1967 when you met with Mr. Fugazy and Mr. Liftig?

A Yes.

Q Can you tell me approximately when that was?

A That was in June of 1967.

Q Can you tell me what the subject matter of that discussion was?

A Mr. Fugazy, William Fugazy, that is, telephoned me and said that he had had a meeting with a Mr. Liftig, who was a business broker, and that Mr. Liftig represented Diners' Club and specifically Mr. Alfred Bloomingdale, who was chairman of the board of Diners' Club, chief executive officer, and that there was some interest, according to Liftig, in Diners' Club acquiring Fugazy Travel Bureau, and would I be interested in meeting with him.

Q Now, prior to that meeting with Mr. Liftig did you have any conversations with anyone concerning an interest in acquiring Fugazy Travel, Inc.?

A Yes.

Q Would you tell us, please, with whom you had such discussions?

A In a situation such as Fugazy Travel Bureau or in a business such as mine where we owned companies and owned securities, you are continually approached by people, business brokers, individuals, companies, who get an idea that they wish to acquire a company or interest in, merge, sell you something else, so that there were a number of instances where we had been approached and had discussions, none of which were fruitful.

Q Did you have any discussions with anyone in the securities market at that time?

A Yes. At that time or slightly before that time, 1967 we talked with a number of investment bankers about a possible public issue of Fugazy Travel.

Q Can you tell the ladies and gentelmen of the jury the circumstances leading up to those discussions with underwriters?

A Some of you ladies and gentlemen will no doubt recall that in 1967 we had a very active stock market

and there were a great many securities both speculative and non-speculative that were being sold to the public. It was about a year before the end of the previous boom. And there had been a beginning of the sale of what we call service companies, that is, companies such as brokerage offices, travel companies, advertising agencies who are not in manufacturing or retail, to the public.

And we decided amongst us, our executive group, that it might be advisable to take Fugazy to the public in order to do two things: One would be to pay off the substantial loans which we had with the banks and, two, in order to have a market and rebuild our working capital so that we could proceed with what we were trying to do, and that was build a franchise operation.

So I got in touch with a firm called L.M. Rosenthal & Company, who were in Wall Street and met with Mr. Rosenthal who had previously done an underwriting of a travel company very successfully. The stock had had a tremendous advance immediately upon sale.

I talked with Mr. Rosenthal several times and there was some feeling by him to do another travel company might not be attractive because there would be a conflict of interest.

So having been in Wall Street so many years,

I approached a firm called Emanuel Deitchen & Company, which was a very old line firm, and they became interested in doing an underwriting.

The partner in charge was a Mr. Paul Porzelt. And he said that in principal after looking at our figures and getting familiar with the situtations, that he would be willing to consider a public issue, but they thought they should have another firm as a partner.

So through Bill Fugazy and some of my connections, we talked to another firm, a larger firm, Paine, Webber & Company, and they discussed this matter.

We then talked to two other firms that I recall. One was Auchincloss, Parker & Redpath, and the other was Allen & Company.

Auchincloss, Parker & Redpath and Emanuel Deitchen it would appear were the ones most interested and the ones better qualified to do this job, and that is about the way the thing stood.

Q When were these discussions with these various underwriters taking place, Mr. Marx?

A They were taking place mostly in their offices in Wall Street, but some of the discussions were at the Fugazy Travel Bureau and some were in my office at 40 Wall Street, where I was then.

Q During what period of time did these discussions take place?

A These discussions were from roughly March of 1967 on.

Q Mr. Marx, you said that one of the purposes was to satisfy your outstanding bank loans; is that correct?

A That's correct.

Q Would you tell the ladies and gentlemen of the jury the nature and the extent of those bank loans of Fugazy Travel in 1967?

A The bank loans were 1,500,000 and they were loans of the Fugazy Travel Bureau, but guaranteed by me. So I naturally had a rather personal interest in trying to alleviate this problem.

The idea here in this underwriting as discussed was that we'd raise $2.5 million through the sale of common shares and we would pay off our bank loan and have $1 million of additional working capital.

Q How much of the company was it proposed would be offered to the public in exchange for $2.5 million worth of purchase of stock?

A Although we had no definitive written agreements because these things do take time, the indications were that we would sell 40 per cent of the company to the public

and retain 60 per cent amongst ourselves.

Q You would sell 40 per cent of the company for $2.5 million?

A Correct.

Q Did these conversations continue through into June of 1967?

A Yes, they did.

Q And you testified that you met Mr. Liftig at the end of June, 1967?

A Correct.

Q Did your conversations continue after your meeting with Mr. Liftig?

A Yes, they did.

Q Would you tell us, please, as best you can recall the sum and substance of the conversation that took place at the meeting attended by you, Mr. Liftig and Mr. Fugazy in June of 1967?

A Mr. Fugazy reiterated what he told me on the telephone in front of Mr. Liftig, to the effect that--

Q Would you tell us what that was, please?

A To the effect that Mr. Liftig represented specifically Diners' Club and in addition was authorized by Mr. Bloomingdale, the chairman of the board of Diners' Club, to enter into discussions and negotiations to acquire

the Fugazy Travel Bureau.

Q What did Mr. Liftig say at that time?

A Mr. Liftig said that that was correct, that he knew that we had had previous discussions a year or two before, but that at this point he believed that the Diners' Club was a very different company than the one we talked about two years previously, or a year and a half previously.

I asked him in what way this was true and he said did I know that the Continental Insurance Company was infusing capital into Diners' Club and had a large stock position and were on the board of directors and had taken a specific interest in Diners' Club.

Q What did you respond to that, if anything?

A I told him that I knew that Continental had bought the Schneider stock, which was a block of stock of one of the originators of Diners' Club who had died, and I also heard that they had put money in in one way or another in either convertible securities which were to be converted into stock of Diners' Club or in other methods.

Q What else was discussed?

A Mr. Liftig went on to say that because of Continental Insurance's position on this, that they had indicated a really strong interest in the affiliation with

Diners' Club which he believed and which he had been told by Mr. Bloomingdale in due course would mean a takeover of the whole company by Continental.

Q Was anything resolved at that meeting, Mr. Marx?

A Simply the fact that we would have further discussions.

Q Did there come a time, sir, that there were further discussions concerning a Diners' Club takeover?

A Yes, there were.

Q Do you know who participated in those discussions?

A As I recall it, about a week later Bill Fugazy and Liftig and I met at Liftig's apartment at the Ritz Towers on 57th Street in New York, and we started to talk about specific methods of trying to accomplish this.

I at that time told Liftig that I was concerned about this and that we were in the process of discussing a public issue. My main concern was that even with Continental as a participant, that we did have a substantial bank loan of a million and a half dollars and that this consistently preyed on my mind.

So the way it was left was that Fugazy, Liftig and I would have additional meetings.

MR. FREDERICKS: Your Honor, may I ask counsel

for defendant to produce those exhibits that have been marked in evidence by counsel? I don't see them on the table.

MR. SANTORA: They are in the box, your Honor. Which ones does he want?

MR. FREDERICKS: I want the ones that have been marked in evidence at this trial.

THE COURT: Just ask him specifically for exhibits and I'm sure he will give them to you. You want B, C, E, F, G--what do you want?

MR. FREDERICKS: I want the financial statements that have been marked, your Honor.

THE COURT: In other words, you don't know what that is. That is F. I think that is what you are asking for. Ask him for the financial statements; I'm sure he will give it to you. I believe that F is the financial statement dated June 30, 1967. Is that the one you want?

MR. FREDERICKS: No, your Honor. I want the Diners' Club.

MR. SANTORA: That is G.

THE COURT: All right. The annual report of Diners' Club. That is G. Do you want anything else?

MR. FREDERICKS: Not at the moment, your Honor.

Q Mr. Marx, I show you what's been marked

Defendants' Exhibit G in evidence. I ask you to examine that and will you tell us what on this financial statement gave rise to the comments that you made to Liftig about your concern about Diners' Club financial position at that time, if anything?

A Not to labor the point, but as a banker to point out two or three of the red flags that appeared. We have under there liabilities current liabilities, notes payable to banks, of $27 million; notes payable on commercial paper of $11,340,000, and accounts payable of $26 million.

Now, that was--in addition to that, long term debt of $15,837,000. That in itself is fairly substantial relative to the asset position of this company.

The other factor which concerned me and which unfortunately turned out to be correct was that as they expanded, in their expenses promotion and advertising had gone from $4,900,000 the previous year to $6,600,000, and their provision for doubtful accounts, which is credit card people that don't pay, had gone from three million, six, to five million, five.

As they expanded you would have this much--these figures would also expand and it meant that they needed a great deal of working capital to carry this on. With Continental in the picture and with the possibility

or probability as we got into this further, of their taking it over, we had unlimited funds because of the Continental Insurance Company is a $2 billion corporation.

Q Did there come a time, Mr. Marx, to your knowledge that there were subsequent meetings between anyone involved with Fugazy Travel and Diners' Club?

A Yes.

Q Who was that, sir?

A Directly after that meeting with Liftig and Bill Fugazy, Bill Fugazy went to the west coast, to California, to Los Angeles and visited with Alfred Bloomingdale and I believe Liftig.

Q How do you know of that, Mr. Marx?

A Well, Bill called me on the phone and said that Bloomingdale had called him and had asked him if he could come out to the coast.

Q Did there come a time that he went to the coast?

A Yes. He went to the coast directly thereafter within three or four days.

Q Did you have occasion to speak with Mr. Fugazy after he returned from the coast?

A Yes, I did.

Q And would you tell us, please, what if anything he told you at that time?

A Mr. Fugazy said that Mr. Bloomingdale had indicated to him in a day long meeting that he was particularly interested in the Fugazy Travel Bureau because of its many years of operations, the fact that we had an excellent franchise operation beginning to gel, and in addition to that, he felt that Diners' Club with its tremendous number of card holders could produce a great deal of business for the travel company.

Q Did he discuss anything else with you at that time concerning the meetings with Mr. Bloomingdale?

A Mr. Fugazy did say that he had mentioned to Alfred Bloomingdale my concern about the condition of the company and the amount of capital it was going to take to do two things:

One, to expand Diners', which they were doing rather drastically; and the other was to carry out the desires of the present owners of Fugazy Travel Bureau to build this franchise operation.

Q Did there come a time when you met with someone or a group of people from Diners' Club?

A Directly thereafter, I would say within two weeks, Alfred Bloomingdale came to New York and we had meetings with him, I had meetings with his financial man Mr. Hays, and I had meetings with Mr. Asch, who was working

for Hays as vice president for finance.

Q Hays and Asch were both involved in Diners' Club?

A Yes, both of them.

Q By the way, did Mr. Fugazy in his conversation with you relating his meeting with Mr. Bloomingdale, did he tell you whether or not he had met anyone else on that trip?

A Yes, he did. He said that by accident he sat in the airplane next to Mr. Asch, who was vice president for finance for Diners' Club, and they discussed the proposed merger negotiations, and so forth, on the way out to California.

Q When did these meetings with the gentleman from Diners' Club you just identified take place, as best you can recall?

A The first meeting I had with Bloomingdale was sometime in July, the middle of July, early July; and that was at Diners' Club's offices on Columbus Circle.

Q Mr. Marx, I show you what has been marked Exhibit 4 in evidence which is identified as the memorandum of intent which bears the date July 20, 1967.

Does that refresh your recollection, sir, as to when you first met with Mr. Bloomingdale in New York?

A Yes. It was about a week or ten days before.

Q So with your recollection refreshed you believe it was a week or ten days before this date of July?

A Before July 20th.

Q And that is your signature on the document of Exhibit 4?

A It is, yes.

Q Would you tell us, please, as best you recall, what Mr. Bloomingdale and the other members of Diners' staff said to you and what you said to them during the course of your meetings with them in July of '67?

A In the course of the first meetings with Alfred Bloomingdale I indicated to him that it was obviously an interesting concept, the merging of these two companies; but I had some qualms about it and my qualms were specifically the million and a half dollars that was outstanding and which I was guaranteeing with the Bankers Trust Company.

And I said that obviously the bank would like to get paid, and from the details of this document which was a letter of intent, there did not seem to be much cash forthcoming; and we had been talking of public issue whereby we would get sufficient cash to pay this off.

And it was very disturbing to me in view of the fact that it was my complete responsibility. And Alfred

Bloomingdale stated that he thought this could be taken care of.

We even had discussions which did not materialize to the effect that the Diners' Club may take over this loan. That was complicated by SEC regulations and the fact that this was a New York Stock Exchange company. But he stated definitely at this meeting and then at a further meeting that there were two things could be done: He could make arrangements for the loan and, furthermore, that there would be a takeover in the foreseeable future of the entire company by Continental Insurance.

I asked him at the time, the stock was then selling in the middle 30's, Diners' Club stock, that is; I asked him, had this thing gone far enough to give us some idea of price. And he stated yes, that he and Mr. Herd had had a discussion of price at $45 a share.

Q On July 20th, you executed a memorandum of intent which is Exhibit 4; is that correct, Mr. Marx?

A That's correct.

Q Subsequent to July 20th did you have any conversations with Mr. Bloomingdale at all concerning the Diners' takeover?

A Yes, I did. Mr. Bloomingdale and Mr. Liftig and I went up one evening in an automobile to Harrison, New

York to Mr. William Fugazy's house where he had some golfing guests, and on the way up the subject which was obviously important to both sides, once again came up.

And he was more emphatic than ever that there would be a takeover and that there would be a method of handling this loan, in view of the fact that the deal itself if and when it was to be consummated could not produce a cash for any of the Fugazys or for myself or for my stepson John Summerlin.

Q Could you fix for us the time of that meeting, sir?

A That meeting was in August. I can't give you the exact date.

Q August of 19--

A '67.

Q Prior to your meetings in July of '67 and your meetings in August of '67 did you have any conversations with Mr. Fugazy concerning his discussions with anyone at Diners' Club about the acquisition?

A Well, during this period I had an office at Fugazy Travel Bureau and I was there at least four days a week, in many instances every day. And so that we had continual discussions, Mr. Fugazy and I, on the subject. Practically on a daily basis.

Q Can you tell us as best you can what Mr. Fugazy said to you and what you said to Mr. Fugazy?

A Mr. Fugazy told me that he had talked with Alfred Bloomingdale and had indicated, as I had indicated, but he had reiterated that I was concerned about our position in this thing, not only because of the funds necessary for the expansion of Diners' and obviously for the expansion of Fugazy Travel, but for the fact that we had this loan and that we didn't know exactly how it was going to be handled.

Even though everybody said it would take care of itself, unfortunately it happened to be my loan. And once again Bloomingdale reiterated to Bill Fugazy, as he had to me, that the Continental takeover would care of this problem because then we would get saleable stock if and when this first part of the deal went through.

Q Did you have occasion to have any discussions with Mr. Bloomingdale between you r meeting in August and the acquisition of Fugazy Travel by Diners' Club?

A Yes. Mr. Bloomingdale was interested in a European connection for Diners' Club. I had been president of the American end of a arge French bank for several years previous to this, and Alfred Bloomingdale asked me if I would be good enough to introduce him to these bankers in Paris; so Bill Fugazy and I went to Paris to meet Blooming-

dale.

Q Do you know approximately when that was, sir?

A End of August, I think.

Q I show you what has been marked and is in evidence as 5 and 6, sir, the acquisition agreement. Did you execute that document?

A I did, yes.

Q As president of Fugazy Travel?

A Yes. As chairman of the board.

Q Your signature appears on Exhibit 6; is that correct?

A Yes.

Q Did there come a time, Mr. Marx, that you became an employee of Diners' Club?

A I did.

Q When was that, sir?

A That was in October of 1967.

MR. FREDERICKS: I'd like to mark these, your Honor.

(Plaintiffs' Exhibits 36 and 37 marked for identification.)

MR. FREDERICKS: Your Honor, at this time I'd like to offer them in evidence without objection from counsel, Defendants' Exhibits 36 which is Mr. Marx's

employment contract dated October 10, 1967, and the collateral agreement relating thereto.

I advise the Court that this is similar to the other two documents previously received.

MR. SANTORA: No objection, your Honor.

THE COURT: Received.

(Plaintiffs' Exhibits 36 and 37 were received in evidence.)

MR. FREDERICKS: Does your Honor want to see these?

THE COURT: No, if they are represented to be the same as to the others--

MR. FREDERICKS: With the exception of the parties--

THE COURT: And the amounts. All right.

Q I show you 36 and 37 in evidence. Can you identify those documents for me?

A Yes. This is my employment agreement dated the 10th day of October, 1967.

Q Your employment agreement with--

A With Diners'/Fugazy Travel.

Q And this is the collateral agreement that related thereto, is that correct?

A Yes, correct.

Q And these were executed on or about October of 1967?

A Correct.

Q Mr. Marx, can you tell me, please, what the nature of your compensation was from Diners' Club or Diners' Fugazy Travel under Exhibit 36 in evidence?

A The cash compensation was nominal.

Q I can't hear you.

A The cash compension was nominal. As I recall, the figure was $6,000 a year. But we received a portion of compensation which was dependent upon the sale of franchises. The figure was $5 million, of which my compensation was half, subject to the fact that we would sell the franchises in sufficient numbers to get the compensation. This was in relation, this was also related to the net earnings of Fugazy Travel Bureau. Whichever one was higher, we got.

There was a limit of $500,000 a year of compensation, of which I was to get half, assuming we sold sufficient franchises. This was to go until such time as we were to receive $5 million.

There was a limitation, however, and that was if the Internal Revenue Bureau would not agree that this was deductible as a tax deduction to Diners' Club, as employees, if that was not permitted, the amount instead

* * * * *

examination of the first witness. We we will do, I would expect on Wednesday, we will complete this witness and then any other details of counsel's case. I should then like to take a recess while I hear you on your various motions. I don't expect, Mr. Fredericks, that you will be presenting any other live witnesses after this one, is that correct?

MR. FREDERICKS: That is correct.

THE COURT: Very well. All right.

MR. FREDERICKS: Your Honor, again I do want to advise the Court that I might be longer on this portion with this witness since I have been light with the others on this portion of the case. I am looking over my file. I have about seven documents that I want to get into.

THE COURT: You go right ahead.

(In open court.)

THE COURT: Ladies and gentlemen, we are going to finish with the direct examination of this witness. I think it would be appropriate to stop. Then we are going to recess. We will resume again Wednesday morning at 9:30. We will continue for a little while longer. There are a few documents which counsel says he wishes to offer and also some questions which he wishes to ask.

When he has completed his direct examination of Mr. Marx, we will then recess for the day.

(Plaintiffs' Exhibits 38 through 43 were marked for identification.)

THE COURT: All right, gentlemen.

Q Mr. Marx, I show you what has been marked Exhibit 38 for identification.

Is that a copy of a letter that you went to Mr. Fugazy?

A Yes, it is.

Q What is the date of that letter?

A November 13, 1968.

THE COURT: November 13, 1968.

MR. FREDERICKS: I would like to move that in evidence. I believe there will be no objection from counsel.

MR. SANTORA: My objection is to relevance. I have no objection.

THE COURT: Very well.

(Plaintiffs' Exhibit 38 was received in evidence.)

MR. FREDERICKS: Your Honor, I am going to mark in evidence withno objection from counsel Exhibit No. 39, which is a letter from the Securities and Exchange Commission dated October 16, 1969 to Alfred S. Bloomingdale, Chairman of the Board of Diners' Club, Inc.

THE COURT: Is that a letter of comment?

MR. FREDERICKS: It is a deficiency letter, yes, your Honor.

(Plaintiffs' Exhibit 39 for identification was received in evidence.)

MR. FREDERICKS: I am also offering in evidence Exhibit 40, which is a letter from Botein, hays, Sklar & Hertzberg forwarding that letter on to George Faunce of Diners' Club requesting that they be contacted in response to the enclosure, and the enclosure is the previously marked document.

MR. SANTORA: No objection.

THE COURT: Received.

(Plaintiffs' Exhibit 40 for identification was received in evidence.)

THE COURT: It is really a cover letter fowarding on the SEC letter of comment.

All right.

MR. FREDERICKS: I am now offering in evidence without objection of counsel Exhibit 41, which is a letter of the signature of George Faunce, III, president of Diners'Club to the Securities and Exchange Commission dated February 18, 1970.

MR. SANTORA: No objection.

THE COURT: Received.

(Plaintiffs' Exhibit 41 for identification was received in evidence.)

MR. FREDERICKS: I am offering in evidence, your Honor, 42 with no objection, which is a letter from defendant Otto Marx to Samuel E. Howard of Kelly, Drye, Warren, Clark, Carr & Ellis dated March 11, 1970, with copies to George Faunce, William and Louis Fugazy, John Summerlin and Granville I. Specks.

MR. SANTORA: No objection.

THE COURT: Received.

(Plaintiffs' Exhibit 42 for identification was received in evidence.)

MR. FREDERICKS: I am offering in evidence as Plaintiffs' Exhibit 43 a letter to Mr. Otto Mark from Kelly, Drye, Warren, Clark, Carr & Ellis dated March 16th in response to the letter of March 11th over the signature of Samuel Howard with copies to George Faunce, William and Louis Fugazy.

MR.SANTORA: No objection.

THE COURT: Received.

(Plaintiffs' Exhibit 43 for identification was received in evidence.)

BY MR. FREDERICKS:

Q Mr. Marx, I show you Exhibit 27 in evidence, which is a letter to Diners' Club, attention Mr. Bloomingdale.

Is that your signature (handing)?

A Yes, it is.

Q Can you tell us the circumstances under which you wrote that letter?

A In accordance with the contract that we signed in October of 1967, we were permitted to have our shares registered once the audited figures were prepared and ready, if we so requested it, in the year 1969.

Q And that was your request for a registration?

A Yes.

Q Do you know whether a registration statement was, in fact, filed?

A It was filed.

Q Do you know when it was filed?

A It was filed I believe the 28th of August 1969.

Q Do you know when the financial year of Diners' Club was, sir?

A March 31, 1969.

Q Do you know when the financial statements for the year March 31, 1969 were completed by Diners' Club

accountants?

A Approximately the 6th of June 1969.

Q I show you Exhibit 33, sir, in evidence.

Did you receive that document (handing)? The document is a request addressed to the selling shareholders forwarding a copy of the Securities and Exchange Commission letter requesting the withdrawal of registration.

A Yes, I did receive it.

Q Did you respond to that letter, sir?

A I believe I did.

Q Do you recall what response you made?

A I responded that I did not want to withdraw -- would not agree to their withdrawing the registration statement.

Q I show you what's been marked Exhibit 42 in evidence.

Is that your response, Mr. Marx (handing)?

A Yes, it is.

Q Did you take it, Mr. Marx, authorize anyone at Diners' Club to withdraw the registration statement, sir?

A I don't recollect ever agreeing to it.

Q To your knowledge, was the registration statement withdrawn?

A I believe it was at a future date.

Q Mr. Marx, did there come a time when you sold your shares that you individually held in Diners' Club?

A Yes, I did.

Q When was that, sir, and to whom?

A I sold part of my shares to Mr. John S. Jemison in December of 1969.

Q At what price did you sell those shares?

A $13-1/2 per share.

Q Excuse me?

A $13-1/2 per share.

Q And the balance of the shares, when were they sold?

A They were sold in March of 1970 on a tender offer by Continental Insurance Company at $15 per share.

THE COURT: How many did you sell to Mr. Jemison, how many did you tender?

THE WITNESS: I don't have the exact figures, but, as I recall it, we sold approximately 30,000 shares to Mr. Jemison and something over 55,000 shares were tendered.

THE COURT: For a total of approximately 85,000 shares?

THE WITNESS: Actually it was around 90.

THE COURT: When was the sale to Mr. Jemison? Was that February?

THE WITNESS: In December of '69.

THE COURT: December of '69?

THE WITNESS: Yes.

THE COURT: Very well.

MR. FREDERICKS: I have no further questions, your Honor.

THE COURT: Ladies and gentlemen, we will recess at this time. Please continue to adhere to the admonition that I have mentioned to you on all previous occasions when you have left the courthouse. Do not discuss the case among yourselves or with any person outside the courthouse. Do not remain in the presence of any person who might be discussing the case. In the event you should learn anyting at all about this case outside the courtroom, you are directed to report the matter to me promptly on your returning to the courtroom.

Finally, though I expect the next time we meet we will be seeing the conclusion of the plaintiffs' case, the case is far from over. Therefore, I suggest that you not form any judgments on the case, keep an open mind on all facts of the case until it has been completed and has been given to you following my charge.

For your own planning, we will resume on Wednesday at 9:30, sit all day; we will resume again on

* * * * *

CROSS EXAMINATION

BY MR. SANTORA:

Q Mr. Marx, you are a plaintiff in this case, aren't you?

A Yes, I am.

Q And Marx & Company is also a plaintiff in this case?

A Yes, they are.

Q Will you tell us who owned the stock of Marx & Company in 1967?

A My wife and myself.

Q Is that true at the present time?

A At the present time two of my stepchildren also own stock and some grandchildren.

Q Now, Mr. Marx, in the testimony in this case you have been described on several occasions as an investment banker. Will you please tell me, what is an investment banker?

A An investment banker is a banker who deals in securities rather than in commercial loans, who deals in all types of investments rather than the taking of deposits, and the law is very specific in that the investment banker is restricted in what he can do. He can be a stock broker and he can be a counselor on investments, and he can do public

issues, selling, financing of industrial companies, privately and publicly, but as against that he can't have checking accounts and things of this kind.

Q How long have you been an investment banker, sir?

A Since 19 -- well, I got out of college in 1932 and I have been in the investment banking field with the exception of five years in the Navy, all that time.

Q Now, as an investment banker, Mr. Marx, have you engaged in the buying and selling of corporations for your own account?

A Yes, I have.

Q And have you also acted as a broker for other persons engaged in the area of corporate mergers and acquisitions?

A Yes, I have.

Q And have you on occasion, sir, served in fact as an expert consultant with respect to mergers and acquisitions of corporations?

A I have.

Q Do you consider yourself a quite, let us say, a very sophisticated businessman and investor, Mr. Marx?

A I presume so.

Q Now, you purchased Fugazy Travel in 1963, is that correct?

A Correct.

Q And what was the purchase price, Mr. Marx?

A The purchase price was a $1,400,000.

Q Now, was that in cash?

A No.

Q How much was in cash?

A $250,000 in cash and two notes for $125,000, which we converted into cash.

Q And what about the rest?

A The rest was in a note.

Q For approximately $900,000?

A Correct.

Q Now, was that purchase price eventually reduced, Mr. Marx?

A Yes, it was.

Q Do you know by how much?

A It was reduced from the differences between 900,000 and 265,000, which is $635,000.

Q So on the $900,000 note you paid 265?

A Correct.

Q Eventually?

A Correct.

Q You originally paid 500,000 in the other cash and the other notes?

A That is correct.

Q So it that correct, then, that your total purchase price to Tower Company, I presume, for Fugazy Travel, was $765,000?

A That is correct.

Q Now, prior to 1965, had you had any expenses at all in the travel business?

A No, I didn't.

Q When you bought Fugazy Travel in 1963 was it your intention at that time to resell that company to someone else at a later date?

A No, it wasn't.

Q Did you have any plans at all as to what you intended to do with that company?

A Simply to improve its earnings capacity and see where we went from there, once that was accomplished.

Q Well, did you intend at that time to stay in the travel business with Fugazy Travel for some indefinite period of time?

A In investments of this type, when I make them I make them for the long term, and so I have no plans what to do with it for the future.

Q From 1963 to '67, did Fugazy make a profit?

A Yes, they did.

* * * * *

management over at Diners'?

A Mr. Bloomingdale.

Q Will you please look at the document before you, Mr. Marx, which is Defendant's Exhibit F in evidence, entitled Fugazy Travel Bureau, Inc. and subsidiaries financial statements, June 30, 1967.

Will you please look at the signature page?

THE COURT: Have you looked at the signature page on Exhibit F?

THE WITNESS: Yes, sir.

Q Is that your signature, Mr. Marx?

A Yes, that is.

Q Please turn to the balance sheet, consolidated balance sheet. Do you see the figure in the right-hand column? It says in parenthesis $794,317.

A In the right-hand column?

Q Yes.

THE COURT: Under stockholders' equity, and further under retained earnings.

THE WITNESS: Yes, I do.

Q Does that figure represent accrued deficits or losses of Fugazy Travel, Mr. Marx?

A Yes, it does.

Q Do you see the figure to the right of that in

parenthesis $499,362?

A Yes.

Q Tell us what that figure represents, Mr. Marx.

A That represents the net deficit for the end of the period.

Q Is that a minus net worth for the company?

A That is correct.

Q Please look at the asset column. We see a total figure of assets of $4,230,225, of which apparently $1,390,016 is called good will.

How did you reach that figure of good will?

A The figure of good will in that amount includes the additional companies that were acquired in the group and in the acquisition of these companies there is the amount of money in excess of the actual asset value.

Q So when you wanted to present your good will you included the acquisitions of these other subsidiaries you were talking about before?

MR. FREDERICKS: I object to that.

THE COURT: Sustained. It is a form objection. You can pursue the area.

Q Mr. Marx, in arriving at the good will you are now including in this figure of $1,390,000 something other than the purchase price that you paid to Tower for Fugazy

Travel?

A No. If you will recall, you mentioned when we were talking about Fugazy Travel we talked about the buyer group. So we are talking about the buyer group at this point.

Q Did this figure of good will as it appears on this balance sheet, sir, reflect the reduction in the purchase price from Tower, the reduction of $635,000, the Tower note?

A I frankly don't know that.

Q Mr. Marx, the company here has an accrued deficit of $794,317, and a minus net worth of $499,362. Now, sir, is it your testimony as an investment banker of many years that you intended in 1967 to sell shares in that company for the public at a price of $8 to $10 a share?

A That is my testimony.

Q At any time between 1963 and 1967 did you engage in discussions to sell Fugazy Travel Bureau to someone?

THE COURT: As opposed to an offering of stock, did you during the period '63-'67 engage in conversations with anyone to sell Fugazy Travel Bureau and/or its subsidiaries for their assets?

THE WITNESS: Yes, we did.

Q Will you tell us with whom you had such discussions?

A As I recall--and there were always numerous discussions on this subject--as far as mergers go, as far as sales go, as far as acquisitions of other companies, two instances occurred to me immediately, actually, three instances.

We had discussions with a big insurance firm in Philadelphia, INA, with reference to this matter. We had discussions with a holding company in London, who had a travel agency, in reference to this matter, and we also had discussions on a merger with Pierre Busetti.

Q Tell us, briefly, when those negotiations took place, Mr. Marx.

A Between '63 or '64, probably, and '67.

Q Did you have any talks with Mr. Alfred Bloomingdale of Diners' in '65?

A Yes, I did.

Q Do you know how those talks were initiated?

A As I recall it, Mr. Bloomingdale and Mr. Fugazy had some chats about this. Who initiated it, I don't know. And then Mr. Fugazy brought me into the situation.

Q What did Mr. Fugazy tell you when he brought

* * * * *

am

A No, I don't recollect.

Q Do you remember that Mr. Bloomingdale ever said to you that he didn't want to get involved with a company that was losing money the way Fugazy Travel was?

A He said that he didn't want to get involved with a company at this price.

THE COURT: But he didn't make any offer to acquire the company for a lesser price?

A No, he didn't, sir.

MR. SANTORA: Your Honor, at this time I would like to read into the record from the witness' deposition in this case, dated February 6, 1974, at page 735, line 14 through 736, line 14, as follows:

THE COURT: Let counsel get it out.

MR. SANTORA: I gave it to them.

THE COURT: Yes, but they are still trying to locate it.

All right, 735 line 14, you may begin. Please don't forget to say Q and A for the reporter.

BY MR. SANTORA:

"Q You say that a year and a half before October of 1967 you entered into negotiations with Diners' to sell them the assets of the Fugazy Travel Company?

"A Yes.

"Q How long did those negotiatons go on?

"A Six weeks to two months.

"Q What participation did you have in those negotiations?

"A I had two or three meetings with Bloomingdale.

"Q Who else participated in those negotiations?

"A Bill Fugazy.

"Q Anybody else?

"A Nobody.

"Q What happened?

"A They fell through.

"Q Can you tell me why?

"A Bloomingdale indicated that he didn't want to get into a company that was losing money and that had financial problems.

"Q Was that the condition of the company at that time?

"A Yes.

"Q Your company?

"A Yes."

Q Mr. Marx, did you testify under oath to those answers in response to those questions?

A I did.

Q Now, after Mr. Bloomingdale turned down your offer

to sell Fugazy Travel, Mr. Marx, did you make any further efforts to sell Fugazy Travel to anybody else in 1965 or 1966?

MR. FREDERICKS: I object to the form.

THE COURT: Yes. It is the first part of the question to which counsel takes exception and I will sustain him as to form.

Q After the discussions with Mr. Bloomingdale were terminated, Mr. Marx, did you attempt to sell Fugazy Travel to anyone else in 1965 or 1966?

A Yes.

Q And who was that?

A As I recall, we had three or four or five sets of discussions with different people who approached us.

Q In each case, these people approached Fugazy Travel?

A Yes.

Q Was one of these people Pierre Busetti?

A Yes.

Q And you say Pierre Busetti approached Fugazy Travel?

A Not specifically. The owner of Pierre Busetti, Mr. Sandoni, I had met before and I had met him at a lunch and that's how it came about.

THE COURT: Was he an investment banker also?

THE WITNESS: No, sir. I would call him an entrepreneur.

THE COURT: And he was from Milan, was he?

THE WITNESS: That is correct.

Q And did you have discussions yourself with Mr. Sandoni, Mr. Marx?

A I did.

Q And did Mr. Fugazy participate in any of those discussions?

A No, he didn't.

Q Did you talk to anybody else over at Pierre Busetti?

A I talked to their American manager, Mr. Piscatell , and I talked to their European head, Mr. Frankolini.

Q And was anyone else from Fugazy Travel involved in these negotiations besides yourself and Mr. Fugazy?

MR. FREDERICKS: Your Honor, I am going to object to that. The precious question was, did you discuss it with Mr. Fugazy. The response is no and the next two questions later we get the response --

THE COURT: Well, he indicated in question form that the wtiness spoke with Mr. Piscatella and Mr. Frankolini. I thought the question was "At those discussions was anyone

else present".

MR. FREDERICKS: No, he asked anyone else involved in the negotiations but him and Mr. Fugazy. I am objecting to the sudden inclusion of Mr. Fugazy when the witness has testified that Mr. Fugazy wasn't involved in the previous question.

MR. SANTORA: I thought it had been established, but I will lay a foundation.

THE COURT: All right. I don't want to go back to the record. But I will permit you to go forward if you get a positive answer.

Q Did Mr. Fugazy participate in any of these meetings or discussions with any personnel of Pierre Busetti?

MR. FREDERICKS: Your Honor, now I have got to object to this. With whom? With Mr. Marx present?

THE COURT: So far as the witness knows, he can answer the question. He may know by being present whether Mr. Fugazy or by Mr. Fugazy telling him about meetings with one or another of these people. So the question at the moment is: Do you know of your own knowledge by either being present or having heard it from Mr. Fugazy or others, that Mr. Fugazy met with anyone from Pierre Busetti, including but not limited, to Mr. Sandoni, Mr. Piscatella and Mr. Frankolini?

A As I recall Mr. Fugazy met with Mr. Piscatella.

Q And did Mr. Sandoni participate in any of these discussions?

A No, he didn't.

Q Do you know how long these discussions went on, sir?

A A period of weeks.

Q Were there several meetings during this period?

A Yes, there were.

Q Do you recall the time period, sir, approximately?

A I believe it was 1966.

Q And do you recall any specific terms discussed between Fugazy Travel and Pierre Busetti?

A Yes, there were some terms discussed. I don't recall the exact numbers. The problem was that Mr. Sandoni disappeared and went back to Italy, and hence we never got anything accomplished.

Q Was that the only problem?

A That was the only problem.

Q Was there any problem because of any objections raised by Pierre Busetti to any aspect of the financial condition or the operations of Fugazy Travel?

A Not to my knowledge.

Q Did you get to the point where you started talking

about price?

A Yes, we did.

Q And do you recall what prices were mentioned?

A No, I don't.

Q Well, do you recall whether or not actual offers of price were made, sir, if you recall?

A I think there was a discussion of values and prices, but in this situation specifically Mr. Sandoni gave all the answers and made all the decisions, and I had one meeting with Sandoni and that was the end of it.

MR. SANTORA: Your Honor, I have a document marked Exhibit H for identification which has some attachments which I think should be sub-numbered.

THE COURT: All right.

(Defendants' Exhibits H-1, H-2, H-3 and H-4 were marked for identification.)

MR.FREDERICKS: May I see them, please, Mr. Santora?

(Pause.)

MR. SANTORA: Your Honor, do you have a copy of this Exhibit H?

THE COURT: I have a notation of what it is. Let me see if I have a copy of it.

MR. FREDERICKS: The copy supplied to me by counsel doesn't have this document (indicating).'

MR. SANTORA: I don't think when it was offered with the other witnesses it had the statement on it.

THE COURT: I don't have H-4.

MR. FREDERICKS: I will have a copy for you, your Honor.

THE COURT: Then I will have a full set when Miss Kruger is finished.

MR. SANTORA: I hand the witness Defendants' Exhibit H.

Q Mr. Marx, I show you a document entitled Defendants' Exhibit H for identification. Have you ever seen that before?

A Yes. I must have seen it.

Q Are you familiar with the memorandum, the contents of it?

A No. I frankly didn't even recollect that there had been a memorandum.

Q Do you know who prepare that memorandum?

A No, I don't.

Q Well, do you recall whether or not you participated in any way in preparing this memorandum?

A No, I don't recall it. I am under the impression that since it was prepared, that it was never signed. It was a trial balloon. But I really don't recollect enough

about it, about the circumstances.

Q Do you know whether or not this document was prepared by somebody at Fugazy Travel?

A I don't know whether it was prepared by somebody at Fugazy Travel except that it has a Fugazy letterhead or by somebody at Pierre Busetti. I don't recall that.

Q Well, do you recall having a meeting at which Mr. Sandoni was present, Mr. Frankolini and Mr. Piscatella, at which you discussed the contents of that memorandum?

A No.

Q Do you recall if Pierre Busetti ever prepared any kind of draft proposal or memorandum on the discussions you were having?

A No, I don't, and as far as Sandoni went, I don't recall any meetings except the meetings I had in Washington at lunch with him.

Q Mr. Marks, I show you Defendants' Exhibit H-1, which is entitled "Draft", and Defendants' Exhibit H-2, 3 and 4, which are entitled "Fugazy Travel Bureau, Inc. and Wholly Owned Subsidiaries", and ask you if you have those financial statements before you, H-2, 3 and 4?

A I don't really recall.

Q Do you know if these financials were delivered to Pierre Busetti by anyone at Fugazy Travel in 1966?

A It's entirely possible. I just don't recall it. It's been nine years.

Q Now, look at the document which is marked Defendants' Exhibit H-1, entitled "Draft". Do you recall ever seeing that one before?

A No, I don't.

Q Well, do you recall receiving any draft proposal for these discussions from Pierre Busetti?

A I don't recall it. It's possible.

Q Did you ever have a discussion with Pierre Busetti about selling him the assets of Fugazy Travel for $250,000?

MR. FREDERICKS: Your Honor, I assume that that means any representative, since Pierre Busetti is a company.

THE COURT:Yes.

MR. SANTORA: I will say in 1966

THE COURT: And any representative of the Pierre Busetti, which would include among others, Mr. Sandoni, Mr. Piscatella and Mr. Frankolini.

A I recall having discussions with both Frankolini and Piscatella and Sandoni, but I don't recall the amounts that are stated in this memorandum.

Q Do you recall whether or not you ever made them -- gave them a definite selling price?

A No, I don't.

THE COURT: And Exhibit H, H-1, 2, 3 and H doesn't refresh your recollection in this regard?

THE WITNESS: Yes. It would appear that we are talking here of a $900,000 figure.

MR. FREDERICKS: Your Honor --

THE COURT Well, not what it would appear on here. YOu can't read from that, and I will direct the jury to disregard the witness' last answer.

I am asking you to look at the exhibits which you hold in your hand, and tell us whether this refreshes your recollection that in 1966 certain figures were discussed between you and representatives of Pierre Busseti?

THE WITNESS: No, sir, I don't recall.

Q Do you recall whether or not these discussions were between yourself, individually, and Pierre Busetti, as opposed to between Pierre Busetti and Fugazy Travel?

A Well, I don't quite understand what you mean.

Q Well, do you recall whether or not any of the discussions that you had with people you mentioned at Pierre Busetti it was discussed that you personally would be making the sale? That any agreement would be between Pierre Busetti and you personally?

A No, it was between Fugazy Travel and Pierre Busetti.

Q Mr. Marx, I would appreciate it, if you have not, just to take a brief look at some of the terms in there, to see if anything in there refreshes his recollection as to whether or not you prepared this memorandum or participated in its preparation or supplying the information on which it is based?

A I really don't recall every being involved in preparing this memorandum.

THE COURT: And your recollection is not now refreshed as to who else prepared the memorandum?

THE WITNESS: No, sir.

THE COURT: Or the draft of the memorandum which is Exhibit H-1?

THE WITNESS:No, I don't recall either of those.

THE COURT: Did you have any documents prepared by counsel in connection with your discussions with the representatives of Pierre Busetti in 1966?

THE WITNESS: No, sir.

THE COURT: Do you know if you received any documents from counsel for Pierre Busetti in connection with those discussions?

THE WITNESS: I don't believe so.

Q Mr. Marx, do you recall having any discussions in 1966 concerning the Pierre Busetti negotiations with a

Mr. Miller of the law firm of White & Case?

A No, I don't. I know Mr. Miller.

Q Excuse me.

A I know Mr. Miller, but I don't recall ever seeing or talking to him about that.

Q You don't recall having any discussions with him in connection with this discussion or the transaction that's described in that memorandum?

A No.

Q Did you ever go to the offices of White & Case for a meeting between the principals of Pierre Busetti to discuss this transaction, in '66?

A I don't believe so.

Q Now, during the early part of 1966, Mr. Marx, do you recall having a problem with a bout of hepatitis?

A Yes, I recall it very well.

Q And you recall that you were bedridden for some time with respect to that?

A Yes.

Q Now, do you recall having any meetings with either Mr. Piscatella or anybody else at Pierre Busetti at your apartment, about this trasnaction during this time that you were bedridden with that illness?

A No, I don't.

MR. FREDERICKS: Your Honor, may we have a conference at the side bar, please?

THE COURT: Yes.

(At the side bar.)

MR. FREDERICKS: Under the new Federal Rules of Evidence and under the old cases as they existed before the codification -- referring to 404 "No prior acts are admissible unless they are designed to show motive, opportunity plan, knowledge"et cetera.

I have been listening here. I first object to this whole line of questioning since it clearly goes beyond the direct examination, but I don't see what relevance any of this discussion is to the case before this Court. I think we are getting bogged down in collateral matter which I don't think is admissible and it is certainly not leading in any direction toward anything that is relevant. I don't see what the whole Pierre Busetti transaction has to do with the case before this jury, and I am objecting on the grounds that this is an attempt to put in prior acts which have no relevance here. It certainly is not within one of the exceptions of 404.

MR. SANTORA: In the first place, I didn't put in issue their state of mind as to what they wanted to do in 1967 when they were fraudulently induced, according

to these statements, they came after us and they induced us. I have been doing my best to try to explore what their state of mind was when they were going through these transactions.

Now, there is coming up a very serious credibility issue. As far as we know, nobody at Fugazy prepared tnat memorandum. It is a very serious credibility issue.

MR. FREDERICKS: Your Honor, this witness hasn't said that nobody -- please, Mr. Santora, don't interrupt. What this witness says is that he has no recollection of preparing this memorandum. Is he going to attack his credibility on that?

Obviously the memorandum was prepared. It is in existence. Somebody prepared it. Nobody denies that somebody, somewhere prepared this memorandum. All the witness says is that he has no recollection. Mr. Santora can't use credibility as a grab bag for proving lack of credibility.

This is 1966, your Honor, the financials are 1966. The transactions talked about here is 1967. I assume, your Honor, that Mr. Santora is not urging upon this Court that the financial situation in March of May, whatever, in '66 has any relevant bearing on the company for whom we have financials of 1967. A completely different picture in the financials of the operation. We are getting

into total collateral matter, clearly irrelevant and beyond the scope of the direct examination of this witness.

THE COURT: I don't think that there is anything in Rule 404 which would prohibit this inquiry, and I would refer you to Rule 104(e), on preliminary questions, and these are preliminary to the 1967 negotiations, where the rule states that the rule doesn't limit the right of a party to introduce before the jury testimony relevant to weight or credibility, and from what counsel has indicated to the Court, the credibility of this witness is at issue.

I would suggest -- the witness seemed to be very responsive to your questions as to exactly what was said during 1967, but his vagueness of recollection as to events but one year previous seems to be something which counsel can inquire about and later comment to the jury about when it comes to a question of whether or not he is to be believed.

A great deal of your case depends upon the oral testimony of your two primary witnesses, this gentleman being one of them. Therefore, his credibility is at issue. Under the circumstances, I will not limit counsel on his cross examination at least until he goes beyond present bounds.

(In open court.)

THE COURT: I don't believe we have a pending question. Am I correct?

MR. FREDERICKS: That is right, your Honor. I asked for a conference prior to that.

THE COURT: All right. You may inquire further, Mr. Santora.

MR. SANTORA: Your Honor, may I have one moment?

THE COURT: We will take our mid-morning recess at this time, ladies and gentlemen. One minute has a way of becoming five and perhaps with ten minutes counsel can coordinate his endeavors and we can move through to the conclusion of the cross examination of this witness.

Ladies and gentlemen, we will take a ten-minute mid-morning recess at this time. Please don't discuss the case among yourselves. Keep an open mind on all facets of the case until it has been concluded. We will go to something in the neighborhood of 12:30 or a quarter to one and at that time we will take our usual one-hour luncheon recess.

The jury is excused, the witness may step down. Counsel are excused. Ten minutes.

(Recess.)

* * * * *

It is a form objection. You can make inquiry.

Q Mr. Marx, is it your testimony that Fugazy Travel was fraudulently induced to transfer its assets to Diners' Club in return for $2,809,669 and 62,000 shares of Diners' common stock, salaries for yourself and William and Louis Fugazy, and a right to participate in the cash received from the sale of franchises?

A The fraud as I understand it was not the transfer of the money and securities to us, but it was the specific indication that the Continental Insurance Company would take over this and thereby relieve me of my outstanding debts, give me securities I could sell.

Q Is it your testimony, Mr. Marx, that you would not have sold the assets of Fugazy Travel for those considerations that we have just mentioned without the additional representation about a takeover of Diners' by Continental?

A That is correct.

Q Was Fugazy Travel insolvent in '67?

A No, it was not.

Q Were you considering at all pushing Fugazy Travel Bureau into bankruptcy in '67?

A No, I was not.

Q Did you ever tell anybody that you were considering putting Fugazy Travel into bankruptcy in '67?

A Yes, I did.

Q Do you recall who that was?

A Yes, it was in reference to the settlement of some notes with Tower Acceptance Corporation.

Q Whom did you tell that to at Tower?

A The trustee in bankruptcy for Tower.

Q What was the purpose of telling him that, sir?

A There were several purposes. We had $900,000 of notes and all the stock of Fugazy Travel pledged on those notes. In order to do a public issue you cannot do a public issue if you do not have the stock, for one thing, and, number two, if you have an outstanding debt of this kind on this company.

So, basically, the purpose of this, I had demand notes, in other words, notes that could be called at any time to the tune of roughly $1,500,000, and I indicated to the trustee that his notes in the amount of $900,000 would be of very little value if I put the company into bankruptcy, and I suggested that we settle those $900,000 of notes, which might have no value, at a reduced figure.

Q You did tell him, though, you were considering putting Fugazy Travel into bankruptcy?

A I certainly did.

Q Was that statement true when you told it to the trustee?

A I presume it was.

Q Did you intend to put the company into bankruptcy?

A I did not say in the statement that I intended to put the company into bankruptcy. I said I could put the company into bankruptcy.

THE COURT: Did you say you were considering putting the company into bankruptcy? I believe that was your testimony.

THE WITNESS: I have forgotten, your Honor, what the phrase was exactly.

Q Mr. Marx, were you trying to sell Fugazy Travel in 1967 to anyone to avoid the possibility of bankruptcy?

A No, I was not.

Q Were you trying as hard as you could to rid yourself of the burden, the financial burden that Fugazy Travel had become to you at that time?

MR. FREDERICKS: I would love the answer, but the question is in very bad form and I have to object to it.

THE COURT: I sustain the objection. The area of inquiry is allowable, but I would suggest "trying as

A I don't have the exact date.

Q You say that you got rid of those other subsidiaries before 1966?

A Yes.

Q Is it your testimony that upon getting rid of those companies that Fugazy Travel started making money sometime before '66?

A It may have been in the year '66 and '67.

Q In 1967 was it making enough money to sustain itself and its obligations out of the revenues produced by its own operations without any more financing from you?

A Yes.

Q Without any more financing from anybody else?

A Depending on whether you wanted to expand the business or not. If you were going to increase the franchise plan it meant an injection of additional funds.

(Defendants' Exhibits N, N-1 and N-2 marked for identification.)

THE COURT: You may proceed, counselor.

MR. SANTORA: Your Honor, I would like to read into the record an excerpt from this witness' deposition of January in this case, January 30, 1974, page 630, line 22, to page 631, line 15:

"Q And you were very much in need or desperate

* * * * *

relatively uninterrupted through to the luncheon recess, but please don't concern yourselves with these side bar meetings or my reasons for holding them. They are held on matters of law which I must deal with from time to time throughout the trial.

You may proceed, Mr.Santora.

BY MR. SANTORA:

Q Mr. Marx, please look at paragraph 17.

A Page 10?

Q Yes.

Now, did the Fugazy group operate in the red and continue to operate in the red despite personal investments by yourself in the area of $2,050,000?

MR. FREDERICKS: From what period of time, your Honor?

Q From 1963 to 1967, sir.

A It's a difficult question to answer. They did operate in the red, but it's a question really of do you include interest payments on $2 million? Do you include extraneous things which are really not part of this company's operations?

Q When you say extraneous things, what are you talking about, sir?

A I am talking about corporate entities that were

losing money that we got rid of and have large payments of interest.

Q Payments of interest for whom?

A For Fugazy.

Q In other words, the company that was left behind.

A No, the parents -- the holding company which controlled these subsidiaries.

Q Who is paying the interest?

A The interest is being paid by the company. The money was borrowed by me, advanced to Fugazy, Fugazy had the money, they paid the interest.

THE COURT: The money had been advanced, as I understand it, to provide capital for Fugazy, is that right?

THE WITNESS: Yes, sir.

THE COURT: And it was on that advance of capital that there were interest payments due to lenders, and Fugazy was paying the interest on that obligation issue?

THE WITNESS: That is correct.

Q Now, Mr. Marx, from the time you purchased Fugazy from Tower until the time you settled with Tower, was the Fugazy group insolvent?

A They were insolvent if I wanted to make them so, because I had a demand note here that was $2 million --

thought it was a million five. It was $2,050,000, according to this document. So that if I made them insolvent by pulling the plug, which I never had a company related to me in any way put into bankruptcy, they would have been insolvent.

Q When you say "pulling the plug," youmean --

A Putting them into bankruptcy. Calling the loan.

Q You mean simply asking for your money back?

A That's right.

Q And that would have put them into bankruptcy?

A That is correct.

Q That is, demanding the money that was due and owing to you?

A That is correct.

Q By the way, when you speak about the Tower settlement, which has been mentioned here a couple of times, can you tell us what the date of that was?

A I was under the impression it was in here but I don't have the date offhand.

Q Can I suggest to you a period of August to September of 1967 and ask you if that refreshes your recollection at all, sir?

A I believe it was August of '67.

Q And was that in the period directly before you signed the purchase agreement with Diners, in 1967?

A Yes.

Q And was it subsequent to the memorandum of intent you signed with Diners?

A That is correct.

Q Now, had you concluded, in 1967, Mr. Marx, that it would be fruitless for you to invest in the Fugazy group any more capital than you had already invested?

MR. FREDERICKS: I am going to object to that question, your Honor.

THE COURT: Just one moment.

I am going to sustain the objection as to form. You may inquire further on the subject. The word "fruitless" somewhat bothers the Court at this point.

Q Had you decided in 1967, Mr. Marx, that you didn't wish to invest any more money in Fugazy Travel?

A No, because I wouldn't have spent $265,000 to settle this claim if I had decided that?

Q Now --

THE COURT: Of course, you were offering $265,000, as I understand it, to settle a claim of $900,000, is that correct?

THE WITNESS: Yes, sir. That is correct, sir. There was previous to this, negotiations with the trustee.

THE COURT: I didn't ask that. I think you have

answered the Court's question.

THE WITNESS: Yes, sir.

Q Now, did you tell anybody in 1967, Mr. Marx, that you hoped to effect a sale of the Fugazy group?

A I don't recall where I did or whether I didn't.

Q Do you know, as you sit here today -- whether you told anybody -- had you decided in 1967 that you wished to effect a sale of the Fugazy group?

A No. I decided in 1967 to do a public issue and raise working capital and pay off these loans.

Q Did you ever decide that your only alternatives in 1967 were to settle the Tower note and try to effect a sale or merger, or, on the other hand, to put the company into bankruptcy?

A No, I never did.

THE COURT: At the time of the settlement with Tower did you consider a number of alternatives, and if so, what alternatives did you consider?

A I considered the public issue which we have discussed, and at that time of the settlement, we were negotiating with Diners' Club.

Q Did you considerthe alternative of investing in the Fugazy group any more capital than you had already received?

A I didn't want to do it. I possibly considered it.

I really don't recall.

THE COURT: Did you reject that alternative by the time you had sat down for your discussions with Diners' Club in 1967?

THE WITNESS: No, sir, I didn't reject that.

THE COURT: Did you reject it at the time you had to choose whether or not to include an agreement with Diners' Club?

THE WITNESS: When I included the agreement, I certainly rejected it.

THE COURT: At least in the moment before you signed the agreement, the other alternative was dead as far as you were concerned?

THE WITNESS: Exactly right.

(Pause.)

Q Had you decided, Mr. Marx, that the only two feasible alternatives for Fugazy Travel in 1967 and for your interest in Fugazy Travel was to try to sell the company or to go into bankruptcy?

MR.FREDERICKS: Your Honor, I don't know when, what period of time that question is directed to.

MR. SANTORA: 1967.

MR. FREDERICKS: No. The question was did you decide. My question is, when and what time are you asking

him, did he decide.

THE COURT: Yes, I think that would be appropriate and I will sustain an objection to the form; you can specify the time.

Q Had you decided at any time prior to June, 1967, that the only two feasible alternatives for you and your involvement in Fugazy Travel was to either sell the company or to have it go into bankruptcy?

A I certainly didn't. In the first place I was negotiating on a public underwriting to raise funds, which was one very specific alternative. The second was, I've never had any company associated with me or any of my other companies in bankruptcy and I hadn't even considered going into bankruptcy.

The third possibility was a merger.

MR. SANTORA: I renew my offer, your Honor.

MR. FREDERICKS: I object to it.

MR. SANTORA: At least with respect to paragraph 19.

THE COURT: Yes. I am looking at 19 right now.

I am going to ask the witness a question.

Was your purpose in offering $265,000 on the $900,000 of Tower notes based upon your desire to rid yourself of the continuing financial burden which the Fugazy group

had become to you?

THE WITNESS: No, sir. My thoughts originally on this were that we could not -- it wasn't feasible, I believe, to do a public issue without eliminating these notes, for two reasons:

One, the notes were onerous in amount, and the second was that the stock was pledged against these notes.

Q At the time of the settlement with Tower, did you consider that there were only two feasible alternatives, having concluded that it would be fruitless for you to invest in the Fugazy group any more capital than you had already invested?

A I certainly didn't want to invest any more capital than I had already received.

THE COURT: Did you consider in light of that that there were only two feasible alternatives left to you at the time of the settlement with Tower?

THE WITNESS: Well, your Honor, it seems to me that there were more than two alternatives, as I just mentioned.

THE COURT: Without wanting to quibble with you, how many feasible alternatives were there?

THE WITNESS: Well, we thought that the underwriting was feasible, and we thought there was a possibility of a

merger at some point, and we knew that it could be thrown into bankruptcy if necessary.

THE COURT: So you say that there were three alternatives?

THE WITNESS: Yes,sir.

THE COURT: At the time of the settlement with Tower?

THE WITNESS: Yes,sir.

THE COURT: The third one being a public offering?

THE WITNESS: Yes, sir.

THE COURT: Hadn't you broken off your discussions with the various underwriters relative to a possible public offering by the time of your settlement with Tower in August of 1967?

THE WITNESS: Yes. They were static at that time.

THE COURT: Are you stating that you didn't abandon the alternative of a public offering at the time of your settlement with Tower in August of 1967?

THE WITNESS: Yes, sir. That is correct. However, we did notice the underwriters, Emanuel Deitjen & Company -- Paul Borzo was the partner -- that we were in serious negotiations with Diners'.

THE COURT: And did you indicate that they should

hold up doing anything further in light of those negotiations which you were having with Diners'?

THE WITNESS: Yes, sir.

Q Did you ever tell anybody in 1967, Mr. Marx, that you wanted to settle the Tower situation so that you could make a sale easy, the sale of Fugazy Travel easier and salvage some of your investments, the investment you had put into that company over the four years?

A Yes, I probably did.

Q Do you recall using the wrod "salvage"?

A No, I don't.

Q Is that the way you were thinking of it at the time, though, in '67?

MR. FREDERICKS: Objection.

THE COURT: Sustained.

Q Did you consider that you wanted to try to either salvage or to recoup or get some money for the sale of Fugazy Travel, to get back whatever you could get back for the investment you had been putting in for four years?

MR. FREDERICKS: I object as to form.

THE COURT: Sustained as to form only. You may inquire as to the subject.

Q Mr. Marx, was it your purpose in 1967 to look for a potential purchaser to try to sell what you could of

* * * * *

Q Did Mr. Liftig approach Mr. Fugazy on his own or what?

MR. FREDERICKS: I don't understand that question, your Honor.

Q You are saying Mr. Liftig approached Mr. Fugazy?

A Yes.

Q Do you remember what he said to Mr. Fugazy?

THE COURT: Were you present at the time?

THE WITNESS: No, sir, I was not.

THE COURT: Perhaps you can tell the jury just who Mr. Liftig was. I understand he was a business broker. You might tell them if you are such a thing, what a business broker does, and how he makes his living.

THE WITNESS: Yes, sir. A business broker makes his living specifically by putting companies together and in some instances selling companies. In other words, he looks for situations whereby two companies wish to merge and he acts as the middleman, where he does the negotiating for or the other.

For instance, a company in the steel business may want to acquire an iron mine to give it facilities. They would go to a person like Mr. Liftig and give him a commission to do this if he can find a company.

In other instances a business broker will get a

you might have had discussions with Mr. Liftig and Mr. Fugazy as early as January, 1967?

"A Yes.

"Q Is that your best recollection as to the first time you heard about this, January 1967, the possibility of Diners' taking over Fugazy Travel?

"A I believe that is correct.

"Q Was Mr. Fugazy the first person to mention that to you?

"A Yes.

"Q When he mentioned it to you, did he indicate that he had already spoken to Diners'?

"A No.

"Q Did he tell you that he was about to speak to them and explore the possibility?

"A Yes.

"Q When Mr. Fugazy mentioned this to you did you approve of that attempt to explore a possible takeover by Diners'?

"A Yes."

Q Mr. Marx, did you make those answers in response to this questions?

A I did.

MR. SANTORA: I would like to read from another

* * * * *

commission or a fee or stock for the sale of a company, if a company has a subsidiary and wants to get rid of it.

So, basically, his job is the consolidation or the tearing apart of a business.

THE COURT: He is sometimes called a finder, isn't he?

THE WITNESS: Yes, sir.

Q Mr. Liftig also represents sellers who would like to find a purchaser?

A Yes.

Q And in January '67 was Mr. Liftig asked to find a purchaser for Fugazy Travel?

A No.

Q Mr. Marx, who paid Mr. Liftig for his services in this transaction?

A Mr. Liftig was paid out of the 62,000 shares of Diners' stock which waI the payment for the Fugazy Travel, the payment or the restricted stock that was escrowed for the travel bureau.

So in this instance the Diners' Club asked us if we would agree to take for tax reasons the 62,000 shares and give 5,000 shares to Mr. Liftig.

Q Now, Mr. Marx, did Mr. Liftig get his stock from Fugazy Travel?

A No, he got his stock indirectly through Fugazy Travel.

Q Who gave Mr. Liftig his stock? Who paid Mr. Liftig 5,000 shares?

MR. FREDERICKS: That is a double question.

Q Who gave Mr. Liftig the 5,000 shares?

A The 5,000 shares were included in the amount of stock given to us and we transferred them at the request of Diners' Club. Mr. Liftig was retained by the Diners' Club by Mr. Bloomingdale.

Q Did you know that of your own knowledge or did someone tell you that?

A I know of my own knowledge and Mr. Liftig told me and Mr. Bloomingdale.

Q You are certain that no one from Fugazy Travel approached Diners' in '67?

A Yes.

Q And you are certain that these talks did not begin until June of '67?

A To the best of my knowledge.

THE COURT: You said something about having diaries which you have consulted. Do you have those diaries here in the courtroom?

MR. TOLAN: Your Honor, we provided the diaries

over the weekend or sometime earlier this week to counsel.

MR. SANTORA: Last night about 6:00.

MR. TOLAN: Well, last night.

THE COURT: They have been provided, nevertheless.

MR. SANTORA: If you want to look at the diaries--

THE COURT: I don't want to pre-empt you. The witness seemed to have some comment regarding the fact that the diaries were a means by which he could better identify dates.

So, we will keep that in mind for the future.

Q You are fairly certain, Mr. Marx, that these talks did not start in January '67?

A My best recollection is they did not.

Q You are pretty certain that Diners' made the first approach to Fugazy Travel?

A Yes, I am positive of that.

MR. SANTORA: I would like to read the witness' deposition under oath under date of August 8, 1973, page 407, line 20 through 408, line 19.

THE COURT: I don't believe I have those pages --yes, I see it.

MR. SANTORA: 407, line 20 through 408, line 19.

Are you ready, Mr. Fredericks?

MR. FREDERICKS: I am not.

THE COURT: You may proceed, Mr. Santora.

MR. FREDERICKS: I am going to object to the reading. May I approach the bench?

THE COURT: No. You want to object to the first question? The second question?

MR. FREDERICKS: I want to object to the first question, your Honor, and the second question. The reason I ask the Court's indulgence is the first two questions refer to a prior reference and I was attempting to find the prior.

THE COURT: You keep looking for it. Your objection to the questions is overruled. If you do have additional material which you wish to read, I will permit you to do that either at the time counsel finishes his reading or subsequently.

MR. SANTORA: May I proceed, your Honor?

THE COURT: You may.

MR. SANTORA:

"Q Do you recall that we spoke about the acquisition of Fugazy Travel by Diners' in '67, Mr. Marx?

"A Yes.

"Q I believe you indicated that you recalled

you might have had discussions with Mr. Liftig and Mr. Fugazy as early as January, 1967?

"A Yes.

"Q Is that your best recollection as to the first time you heard about this, January 1967, the possibility of Diners' taking over Fugazy Travel?

"A I believe that is correct.

"Q Was Mr. Fugazy the first person to mention that to you?

"A Yes.

"Q When he mentioned it to you, did he indicate that he had already spoken to Diners'?

"A No.

"Q Did he tell you that he was about to speak to them and explore the possibility?

"A Yes.

"Q When Mr. Fugazy mentioned this to you did you approve of that attempt to explore a possible takeover by Diners'?

"A Yes."

Q Mr. Marx, did you make those answers in response to this questions?

A I did.

MR. SANTORA: I would like to read from another

session of the witness' deposition, your Honor, which is the session of January 30, 1974.

THE COURT: Before you do that, Mr. Fredericks has indicated there might be another portion of this deposition which he would want to read to the witness.

Mr. Fredericks, do you have that portion?

MR. FREDERICKS: We have not found it, your Honor. I am trying to find the reference that counsel is referring to in his question.

THE COURT: He will have the opportunity to read from the material to the witness on redirect, then.

What are you turning to now, counsel?

MR. SANTORA: It is the deposition session of January 30, 1974, page 607, line 20--

THE COURT: Let's have counsel turn to that.

MR. SANTORA: --through 608, line 5.

THE COURT: This is an examination by a Mr. Kay.

MR. SANTORA: Who is seated on my left here.

MR. FREDERICKS: Can I get the pages?

MR. SANTORA: Page 607, line 20 through 608, line 5.

THE COURT: Do you have that?

MR. FREDERICKS: Yes, your Honor.

MR. SANTORA:

"Q Mr. Marx, can you tell us when to the best of your recollection the negotiations with Diners' Club or the acquisition by Diners' Club of the Fugazy Travel business commenced?

"A I think I testified to that long ago. And at the time I said it was, as I recalled it, it was late '66, early '67.

"Q Who was in Fugazy Travel who commeced those discussions with Diners'?

"A Bill Fugazy."

Q Now, Mr. Marx, did you testify under oath with those answers in response to those questions?

A I did.

Q Does that refresh your recollection at all, Mr. Marx, as to whether or not these talks got under way in January of '67 as opposed to June?

A I think it is very simple. Look in the diary and determine whether it is June or January. I am under the impression it was June.

Q You were rather positive about that when Mr. Fredericks asked you. That is why I am asking you now.

THE COURT: Sustained.

Q Mr. Marx, is it your testimony here that without

your receiving the representation that there would be a takeover of Diners' by Continental you would not have made the '67 sale to Diners'?

A That is correct.

MR. SANTORA: I would like to read from this witness' deposition of August 8, 1973, at page 420, line 13, to 422, line 18.

THE COURT: Counsel will get that. As soon as counsel has it, he will notify you.

MR. FREDERICKS: I have it.

MR. SANTORA:

"Q Did you feel at any time that the public issue road, shall we say, was preferable to the taking over by Diners'?

"A Yes, I did.

"Q What, if anything, occurred to change your mind about that?

"A Well, Mr. Liftig came up with a deal which had tremendous financial potential and I believed that it would clear up all our debts. The underwriting bueinsss, like trial before a jury, is not definite until you have a check in hand and I have had deals where we have had a registration statement become effective and we could not sell the stock and I know the problems of

what happens to markets. So that when we were able to see a deal which would be extremely profitable I thought it was a wiser move.

"Q Besides, a registration statement can take a long time?

"A Yes, especially in 1967 when we were jammed.

"Q What exactly did Mr. Liftig say to you that you felt was so significant in terms of the great financial possibilities that you just spoke of?

"A The deal, as outlined in the contract, where we were to get $5 million in income from the sale of the franchises and only to be reduced to $2.5 million if they couldn't get a deduction, if Diners' Club could get a deduction on their income taxes, because the original block of stock was then selling at 36, so we were looking at a deal for Fugazy of $5 million plus--how many shares in the first 36 group?

"Q I will tell you in a moment. 57,000.

"A 57,000 shares sell at $36, so this was a pretty damned attractive deal of which I got half. And in addition to this we visualized a Continental takeover at $45, so that you could have another $600,000 thrown in the pot and it was just a hell of a sweet deal, we thought.

"Q So you thought with the Continental offer a takeover would enhance the deal even further?

"A That is right.

"Q Apart from the Continental takeover, did you think it was a good deal?

"A It was an attractive deal. It was not anything like it because Diners' Club always had its problems except for two years of operation, since Mr. Schneider died.

"Q Was there any suggestion by you expressed to Mr. Bloomingdale or anybody that you wouldn't go through with the deal apart from the takeover?

"A No, there was no suggestion on that basis. It was simply a general consensus between Fugazy and Bloomingdale and myself that this was going to be done, the Continental takeover. And this was more and more evident as Continental kept pouring money in."

Q Mr. Marx, did you testify under oath to those answers in response to those questions?

A I did.

Q Now, in 1967, let's say before you even started talking to Mr. Bloomingdale about these negotiations, had you heard any rumors in the market place about an increasing involvement of Continental Insurance Company in the

activities of the Diners' Club?

A I did.

Q And what was the source of that information, sir?

A The source of the information was banks, investors, innumerable people.

Q Were articles appearing in various publications at this time making reference to this?

A I don't recall any articles.

Q So you are saying that before you spoke to Mr. Bloomingdale for the first time you had heard certain rumors that Continental had a position in Diners' and was becoming involved in some way?

A Yes.

Q Did you learn also at that time and from people other than Mr. Bloomingdale that Continental had been extending or was about to extend financing to Diners' Club?

A That was in publications.

Q Prior to the October 1967 closing of the contract, who was it that told you, who was it from Diners' or Continental that told you that there may be a Continental takeover of Diners' Club?

A Mr. Bloomingdale.

Q Anybody else?

A Mr. Liftig.

Q I asked you, Mr. Marx, about people who belong to Diners' Club or the Continental group. Did Mr. Liftig have a position in Diners' or Continental?

A No, but he represented Mr. Bloomingdale.

Q So now you got it from Mr. Bloomingdale. Did anybody from Diners' or Continental tell you before October '67 that there might be a Continental takeover?

A Mr. Flug.

Q Mr. Flug. Do you recall when that was?

A No, I don't.

Q Are you certain that Mr. Flug told you that?

A Yes.

Q Mr. Marx, do you recall Mr. Flug being involved at all in those negotiations leading up to the October '67 agreement?

A Yes, I do.

Q What did Mr.Flug tell you?

A Mr.Flug told me that it was his understanding that the Continental Insurance Company was planning to take over the Diners' Club.

THE COURT: What else did he say, if anything?

A That was all he said on that subject, sir.

Q And what did Mr. Bloomingdale say?

A Mr. Bloomingdale told me several times that it was absolutely definite that the Continental takeover would be effectuated and that the price would be $45 a share.

Q Now, in February 1970 there was a takeover of Diners' by Continental, wasn't there?

A That is correct.

Q By the way, is this the same Mr. Bloomingdale who yo thought at that time was a very poor businessman or a very poor manager?

A I said I thought the management was poor.

THE COURT: Specifically who?

THE WITNESS: Mr. Alfred Bloomingdale.

Q Now, prior to that -- prior to October, 1967, no one gave you a definite date that this takeover was going to take place, did they?

A No, they didn't.

Q And did anyone from Diners' or Continental give you any -- well, let's say Mr. Bloomingdale is the only person you are talking about or Mr. Flug, if you will -- did anybody from Diners' tell you anything about the specific details of this proposed takeover?

A The details were that it would be an exchange of shares and the price would be $45 a share.

Q Who told you that?

A Mr. Bloomingdale.

THE COURT: When was that, that he told you that?

THE WITNESS: He told me that in July, August and September.

THE COURT: In other words, over a three-month period he told us there would be an exchange of shares and over that same three-month period he indicated that the exchange price would be $45 per share?

THE WITNESS: Yes, sir.

Q Now, Mr. Marx, in let us say prior to October 1967, was it legally possible for Continental to take over Diners'?

A I don't know. I'm not a lawyer.

Q Well, now, Mr. Marx, you are an investment banker, and did you hear anything in October of 1967 or thereabouts about a statute that had to be passed to permit an insurance company to form a holding company to engage in this sort of merger or acquisition that you are speaking about?

A Well, prior to October 1967 I had not heard that.

Q All right. Do you recall at any time from June of 1967 that you heard that there was a question that Continental take over Diners' until the State Legislature passed an enabling bill to allow them to form a holding company ?

A I heard that after October '67.

Q When is the first time you heard that?

A I can't specify the exact date, but it was after. It was November, some time such as that .

Q Do you know where you got that information from?

A I got that information from Mr. Fugazy.

Q Now, based on what you had heard prior to October , 1967 and what you knew, Mr. Marx, did you consider the possibility that the Continental proposed or alleged

takeover of Diners might never take place?

MR. FREDERICKS: When, your Honor? The time --

THE COURT: Yes, I think it is a fair objection. Why don't you rephrase the question.

Q Prior to October, 1967, Mr. Marx, let's say between June and October,1967, did you consider the possibility that Continental might never take over Diners?

A I didn't consider the possibility because I was told they would.

Q And if Mr. Bloomingdale said it was going to happen, it was going to happen, in your view, is that so?

A In my view, if Mr. Bloomingdale, the chief executive officer, and the president and chairman of the board of this company --

Q Which said --

A -- said that Mr. Herd had told him that this would happen, and Mr. Herd was virtually in control of Continental, I believe it would happen.

THE COURT: You say Mr. Herd was virtually in control of Continental?

THE WITNESS: Yes.

THE COURT: Were you aware of whether or not Continental had a board of directors?

THE WITNESS: Yes, sir.

THE COURT: Do you know how many members were on that board?

THE WITNESS: No, I don't.

THE COURT: Were there more than two, including Mr. Herd?

THE WITNESS: Yes.

THE COURT: Were you aware whether or not Continental had stockholders?

THE WITNESS: Yes.

THE COURT: And do you know whether or not Mr. Herd was a majority stockholder in the corporation, that is, that he could vote more than a majority of the shares of the corporation?

THE WITNESS: I knew he couldn't.

THE COURT: He could not?

THE WITNESS: He could not.

Q Mr. Marx, in your experience as an investment banker, have you been involved in situations where merger talks and acquisition talks went on for periods of time and perhaps even documentation was drawn up and the mergers never came off?

A Yes.

Q It is not a unique occurrence? It has happened

quite often?

MR. FREDERICKS: Objection, your Honor.

THE COURT: Sustained.

Q Now,you mentioned that you were analyzing the Diners' financial reports at some point during 1967.

Do you recall that testimony, sir?

A I do.

Q And you were studying it to see what the condition of Diners was, is that correct?

A That is correct.

Q And did you see in any of the financial reports references to financing from Continental?

A I don't recall.

Q Did you engage in any activity or make any inquiry in, say, prior to October '67, to study for yourself any factors which might tend to suggest a possible takeover of Diners' by Continental?

A Yes, I did.

Q And what activities did you engage in?

A I discussed with Mr. Hays of the Diners' Club, I discussed with Mr. Bloomingdale of the Diners' Club and with Mr. Flug of the Diners' Club, the methods of financing and that the Continental Insurance Company would do it with Diners' Club. I also discussed with them how many

men they had on the board of directors of Diners' Club. I also discussed who these people were, whether they had been Diners' Club members before or whether Continental had put them on.

All these factors certainly influenced my decisions.

Q Well, in looking at the period of 1967, as best you can recall, can you tell me whether you relied more on your observations than on some comment from Mr. Bloomingdale?

A I relied more on the comment from Mr. Bloomingdale.

MR. SANTORA: I would like to read from this witness' deposition of July 24, 1973.

THE COURT: Page?

MR. SANTORA: Page 115, line 12, to 120, line 23.

THE COURT: All right. Let counsel get that out and look at it.

(Pause.)

THE COURT: Skip the colloquy which appears on page 117. I think we can proceed. I see some there.

MR. SANTORA: All right.

Beginning at page 115:

"Q Apart from that date which we may get to at a later time was there any indication given to you by

Mr. Bloomingdale or anybody else in 1967 that the takeover would occur at some point in 1967?

"A I don't recall the date of takeover being stated.

"Q Do you recall asking at that time, which I assume to be prior to October 1967, for a date?

"A I believe I asked the time.

"MR. FREDERICKS: I see indications here of meetings with Mr. Fugazy and Liftig in January of 1967, could it be that you got started in 1966 and it would be in the 1966 diaries.

"THE WITNESS: It is possible. I just have in the back of my mind that the first meetings were in January with Liftig.

"MR. FREDERICKS: Yes. The first meetings with Liftig and Fugazy.

"Q Now, again, focusing on this period of January '67 through to October '67, did Mr. Fugazy, Mr. William Fugazy give you any dates or statements as to the timing?

"A Nothing except what I suggested and that was that it was in the foreseeable future.

"Q Anything more definite than that?

"A No.

"Q Did you ever ask Mr. Fugazy during that period what foreseeable future meant?

"A I asked both Fugazy and Bloomingdale and got nothing more definite than that.

"Q Did you get the impression that they were withholding that information from you for any reason?

"A No, I got the impression that these things legally take a long time, especially with large corporations.

"Q And did you get the impression that they didn't know or weren't able to tell you?

"A No. I got the impression they were in the middle of the negotiations. My experience was that these things take a lot of time. By that I mean six months.

"Q After the conversation that you just referred to with Mr. Bloomingdale, I notice you say that at various times after October 10, 1967, certain people from Diners' or you say defendant Diners', represented to plaintiffs that Diners' would be acquired by Continental. Do you recall the next occasion when someone said something like that to you?"

Slipping the colloquy, your Honor. At line 24:

"Q Whether before October '67 or after October '67, when was the next conversation you had with someone from Diners' following the one you just spoke about with Mr. Bloomingdale, if you recall?

"A I had several conversations, pretty continuously with Bloomingdale and daily with Fugazy. One had come to my mind, that I can't give you the date is that Fugazy gave a party in the country at his place in Harrison, New York and Bloomingdale and Liftig and I drove up in the car where we discussed the entire matter again but those two things stand out in my mind.

"Q In that conversation what did Mr. Bloomingdale say to you, if you recall?

"A Pretty much the same. There was never much of a change. It was from his point of view something that was going to be done.

"Q Was this before or after your earlier conversation?

"A Within two or three weeks.

"Q And you were going up to Mr. Fugazy's home?

"A Right.

"Q And did Mr. Bloomingdale become more specific at this time as to the date when the takeover was going to take place?

"A No.

"Q Did he say anything else about the price?

"A No.

"Q During that conversation did you ask him to become more specific about the date?

"A No. There was simply further discussion of the same.

"Q Again, was it your feeling from this that this would take place in 1967?

"A My feeling, as I recall it, was that it would take place within six months.

"Q Did Mr. Bloomingdale ver mention to you the period of six months?

"A No.

"Q Did Mr. Fugazy ever mention it to you?

"A No.

"Q How about Mr. Liftig?

"A No.

Q This is something that you --

"A This is from my own experience with handling of mergers and consolidations and dealing with large corporations.

"Q Is there anything magic about the six months period?

"A No.

"Q It can be more and it can be less?

"A Right.

"Q It can be never?

"A It was represented that it was going to be.

"Q I am saying, if you hear about a prospective merger or takeover of sort that hasn't been approved or finalized yet, it is possible that it may not take place, correct?

"A Correct. However --

"MR. FREDERICKS: Let him finish.

"Q Continue.

"A However, in my experience, if both corporations continue to increase their investment and continue to add substantial sums of capital continuously and on a personal basis it would be indicative that they weren't doing this except for that some sort of a takeover.

"Q And this is something that you would infer from seeing that behavior?

"A Yes."

Q Now, Mr. Marx, did you testify under oath to those answers in response to those questions, sir?

A I did.

Q Now, in 1968, Mr. Marx, you mentioned that there came a time when you were talking about amending your employment agreement. Do you recall that, sir?

A Yes.

Q Do you know when you signed the amendments to the employment agreement?

Q Now along about the end of '68, Mr. Marx, did you try to sell your shares in Diners'?

A I could not sell them.

Q Did you try to sell them?

A No, I did not.

Q Did you ask Continental to buy them from you?

A Not in '68.

Q Do you know when you asked Continental to buy your shares from you?

A In '69.

Q Do you know what part of '69?

A To the best of my recollection I believe the first six months of '69.

Q Did you offer to sell them at any particular price?

A Yes, I did.

Q What price?

A $50 a share, 50,000 shares.

Q What was that in relation to the current or then market price? Why were you offering to sell your shares to Continental below the market price?

A Because the shares were restricted shares. I could not get any price for them and I was extremely anxious to pay off my debts, so I had lunch with Haro

Johnson and suggested this procedure.

Q Who suggested it?

A I suggested it.

Q What did Mr. Johnson say?

A Mr. Johnson said he would discuss it with Mr. Herd and come back to me. He also said that they had had an offer from an oil company at $65 a share. So I then said, "If that is the case and you buy my shares at $50, if you take over you will have to pay more than 50, or if you don't, you sell it to the oil company at $65 and you get profit either way."

Q What I'm trying to ask you, at the time you were speaking to Mr. Johnson did you ever believe that this takeover was imminent?

MR. FREDERICKS: I object to the form of the question.

THE COURT: Sustained.

Q At the time you offered to sell the shares to Continental did you ask Mr. Johnson what the status of the proposed takeover was?

A He said it was still being considered by Mr. Herd. That was the reason I made the statement about what their position would be at $50.

Q Now, you say Mr. Johnson never got back to you.

* * * * *

Further, I move to strike the last question and answer.

THE COURT: I will sustain an objection to the last question and strike it. Now you can ask him if he was asked those questions and made those answers.

Q Mr. Marx, with respect to the last deposition testimony that I read that you heard, will you please tell us if you testified under oath to those answers in response to those questions?

A I did.

MR. SANTORA: The last question was striken?

THE COURT: Yes, I think you should ask it again at this time for continuity.

Q With respect to the registration of stock which we know was requested in April 1969, Mr. Marx, can you tell us what it is you claim Diners' did do or did not do with respect to the registration of your stock that you are complaining of, sir?

A In the first place, the contract which was signed in October of 1967 calls for the registration of our shares as soon as the March 31st Diners' Club final figures were done for the year 1969, we were allowed to register our shares or request that the company register our shares.

Up to this point we were with unregistered shares, we could not sell the stock. So on the advice of counsel on the 16th of April 1969, I wrote a letter requesting Diners' Club to comply with this article of the contract.

THE COURT: That is Exhibit 27 or 28?

MR. SANTORA: Both copies of the same letter.

THE COURT: What do you have in front of you, sir?

THE WITNESS: I have 27, sir.

THE COURT: So you sent that letter off?

THE WITNESS: I sent the letter dated April 16th. This letter was signed by myself and Louis and William Fugazy, and it requested prompt action, so that we could sell our shares and finally get some money.

THE COURT: I think you have answered the question.

MR. FREDERICKS: He has not. The question is, "What are you claiming that Diners' Club didn't do in response to that letter," and that question has not been answered.

THE WITNESS: This is a long answer.

THE COURT: I am going to let you answer it. You go right ahead.

A (Continuing) Previous to my writing this

letter in March of that year I was approached by Mr. Bloomingdale and asked if I was going to write this letter to request that they register our shares, and I stated yes, I was.

And he said, "Is this necessary?" I stated that I was perfectly amenable to any method of getting me some money to pay these debts, and since no suggestions were forthcoming I wrote the letter on the 16th.

We then had some other meetings with Mr. Bloomingdale, with Mr. Flug, with counsel for the Diners' Club, Mr. Jules--what is his name--Weber, of Hayes, Sklar, who suggested different methods of doing this.

On the 6th day of June the figures for Diners' Club became available, and those are the March 31st audited figures, March 31, 1969.

If there had been a desire to move on this registration statement, all the work that you have seen that has been shown as an exhibit--

MR. SANTORA: I object to this.

THE COURT: Yes, I think you are getting a bit afield. Tell us what Diners' failed to do. Now you have reached a point, June 6, 1969. Diners' accountants finished their figures for the year ended March 31, 1969? Is that right?

THE WITNESS: Yes.

THE COURT: So the figures are not out, according to your testimony?

THE WITNESS: But the process, the S-1, a registration statement in which you have to answer a great many questions, none of that had been prepared, and if people wished to get these things done rapidly, that should have been all prepared and the figures added to it and the registration statement filed within a week or ten days.

This registration statement was not filed until August 28th. Meanwhile, the stock was declining. Hence, during this period, between June 6th and August 28th, I was approached by Mr. Bloomingdale, by Mr. Weber, by Mr. Hays and by Mr. Flug to see if they could not find an alternative. It was a method of dragging their heels so they would not have to file this registration statement.

MR. SANTORA: I move to strike.

THE COURT: Strike that it was a method of dragging their heels and all that follows. It's the witness' own conclusion.

Did any of them say that that is what they were doing?

THE WITNESS: No, they didn't.

THE COURT: Let's get on with it now. What, if anything, did Diners' Club do beyond that?

MR. FREDERICKS: Your Honor, that is not the question. The question is a broad one, what do you claim Diners' Club did or did not do, and his statement that they dragged their heels is responsive to that question.

THE COURT: Well, I disagree with you and it is going to remain out. The jury will disregard the comments of counsel. Let's continue.

What did Diners' Club do or not do?

THE WITNESS: They then filed this registration statement six to eight weeks late and let the registration statement run until they received in due course from the Securities and Exchange Commission a deficiency statement, which is normal.

THE COURT: That is normal, isn't it?

THE WITNESS: That is normal.

THE COURT: How long does the SEC normally take to get out a deficiency letter or how long were they normally taking back in the summer of '69, if you know? A day? Three days? Five days? Ten days? Or more?

THE WITNESS: Two to three weeks.

THE COURT: That was your experience?

THE WITNESS: Yes, sir. So at the end of

three to four weeks or whatever the period was--I do not have it in front of me--they received a deficiency letter.

THE COURT: In this case instead of two to three weeks it took the SEC longer to respond.

THE WITNESS: I don't have the date in front of me, sir. On the receipt of the deficiency letter, Mr. Weber, who is counsel for the company, and Mr. Flug, who was the financial man at that time, called me and came to see me at 40 Wall Street and said, "We have received deficiencies from the SEC and if we are to correct these deficiencies it will have a very deleterious effect on our earnings. Will you allow us to withdraw the financial statement?" My answer was no.

Directly thereafter I received a telephone call from the Newark president of Diners' Club, Mr. Faunce. He asked me if I would get together with him and discuss this matter. I had lunch with him. Again Mr. Faunce said, "What will you accept to let us either postpone or withdraw the registration statement?"

I said, "I must have some sort of relief on this loan at the bank." And so I made them a written proposition to the effect that we would postpone until the following March a new registration statement and they would pay three-quarters of the interest on the loan and

retain the balances that were necessary, 20 per cent balance. You borrow a million dollars, you have to keep $200,000 in the bank.

THE COURT: That is what is called a compensating balance, is it not?

THE WITNESS: Correct.

A So that the proposition was considered and turned down by Diners' Club. When we made another proposition, of a different type, and that was not acceptable to Diners' Club.

All this time, the stock was going down, and the registration statement was not effective, and until it becomes effective, that is, approved by the SEC, which says it is not approved or disapproved, but it becomes effective, we can't sell our stock. It doesn't become a free stock.

So that this is exactly what in my opinion the Diners' Club did as far as not making an effective registration statement so our stock became free, and I was told by my attorneys that this is a breach of contract.

MR. SANTORA: I move to strike that.

THE COURT: Yes. Strike the last part of it, "and I was told by my attorneys that this is a breach of contract." The jury will disregard it.

Q Mr. Marx, did you do anything to delay the filing or the effectiveness of this registration statement?

A I did not.

Q Was there anything you did or failed to do to cause the delay?

A No; I did not.

Q Please look at Exhibit 27, in front of you, and reading from the last paragraph, sir, over your signature, it says, "In connection with such registration, the undersigned are prepared and hereby offer to advance to you an amount sufficient to reimburse you for one half of all registration fees and expenses, as provided in said Paragraph 10a-b and to furnish the indeminity agreement referred to therein."

Now, Mr. Marx, did you ever tender the advance payment of one half of the registration expenses to Diners' Coub?

A I did not, because they said --

Q Excuse me, sir. You said, "I did not"?

A That's right.

Q Did they ever request that you send that money to them?

A They sent me a statement of what these amounts were, but they never sent me any specific figures.

MR. SANTORA: May I have this marked for identification, please.

(Defendants' Exhibit P marked for identification.)

THE COURT: This is a letter that has been marked Defendants' Exhibit P.

MR. FREDERICKS: May I see it?

(Pause.)

MR. FREDERICKS: No objection, your Honor.

MR. SANTORA: I offer this in evidence, your Honor.

THE COURT: Received.

(Defendants' Exhibit P for identification was received in evidence.)

Q Mr. Marx, I show you Defendants' Exhibit P in evidence and ask you if you recall sending a copy of that letter to Mr. Weber.

A I did.

Q Is that your signature, Mr. Marx?

A It is.

MR. SANTORA: I would like to read this aloud, your Honor.

THE COURT: It's in evidence. You may.

(Mr. Santora read to the jury from Defendants' Exhibit P.)

Q Now, Mr. Marx, at any time, did Diners' tell you during this period of August 1969 that you were holding up the registration statement by not sending in the money that you had agreed to send in your letter of April 16, 1969?

A They did not.

Q No one ever said that to you, either in letter or in oral conversation, sir?

A Not to my recollection.

Q Did you ever pay the money?

A I never got an effective registration statement.

THE COURT: Did you ever pay any money --

THE WITNESS: No; I did not.

THE COURT: -- for the filing of the registration statement?

THE WITNESS: No; I did not.

Q Mr. Marx --

THE COURT: Could I see the agreement itself, counsel?

MR. SANTORA: Yes, your Honor.

THE COURT: You may proceed, sir.

Q Mr. Marx, do you know when it was that you commenced this lawsuit?

A I beg your pardon?

Q Do you know when it was that you started this lawsuit?

A No; I don't know the exact date.

Q If I suggest to you June of 1970 --

MR. SANTORA: Or maybe I can get a stipulation from counsel as to June of 1970.

to the jury at such time as you sum up. You are not going to read them twice.

Anything else?

MR. FREDERICKS: Your Honor, I would respectfully suggest that, notwithstanding the fact that they are in evidence, I think I have a right, before I conclude my case and not in summation, to have certain items presented to the jury. I have a couple of paragraphs.

THE COURT: All right. Start reading right now.

(Mr. Fredericks read to the jury from Plaintiffs' Exhibit 45.)

MR. FREDERICKS: -- which is an attachment to the listing filed by Diners' Club.

I have nothing else I want to read to the jury at this time. Thank you, your Honor.

THE COURT: Mr. Santora, is there anything else you wish to read to the jury?

MR. SANTORA: No, your Honor.

MR. FREDERICKS: Your Honor, at this time I would like to offer the document that I advised the Court I would ask the Court -- I advised the Court at the beginning of the proceedings that I would ask to have the Court take judicial notice of this.

THE COURT: You offer a document that you ask the

Court to take judicial notice of?

MR. FREDERICKS: At the beginning of the proceedings, we advised the Court that we would ask you to take judicial notice of this volume of regulations of the Securities & Exchange Commission regarding the filing of statements which covered the period of this transaction.

MR. SANTORA: I object to that.

MR. FREDERICKS: It is the Government fiscal year, which overlaps the calendar year.

THE COURT: It would be from July 1, 1969 to June 30, 1970. I don't see the relevance.

MR. FREDERICKS: This registration statement was filed in August, your Honor.

THE COURT: Of what year?

MR. FREDERICKS: We claim the financials were ready in June of 1969. There is also a statement on the chart as to the time period of the prior years.

THE COURT: Any comments, counsel?

MR. SANTORA: I object to it. I don't see what any averaging in there has to do with any specific registration statement. I think it stands or falls on its own merits.

THE COURT: I will take judicial notice of this, and you can give me an appropriate request to charge.

Anything else?

MR. FREDERICKS: No, your Honor. Plaintiffs have nothing further. Plaintiffs rest.

THE COURT: Ladies and gentlemen, you are excused. Please do not discuss this case among yourselves or with any other person. Keep an open mind on all facets of the case until it has been concluded and given to you following my charge.

The jury is directed to return tomorrow morning at ten o'clock. I have a matter on at nine-thirty, which will take about twenty minutes. I don't want to keep you sitting in the jury room unnecessarily.

You are directed to return, ready to go, tomorrow morning at ten o'clock.

Thank you very much.

(The jury left the courtroom.)

THE COURT: I will hear motions now.

MR. SANTORA: Your Honor, I don't think a prima facie case has been made out on any of the three aspects of the single cause of action, either on a 10b-5 requirement, certainly not with respect to the best efforts claim on the registration statement; I don't think even factual allegations have been spelled out which under any circumstances wuld require such a claim to be submitted to the jury.

In connection with, for example, the '68 claim,

the 1967 fraudulent transaction, I think if we take all of the testimony that is given by the plaintiffs, we see that there is no claim made out for the 10b-5, because everything that they were told was true.

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pm They were told by Mr. Bloomingdale and Mr. Fugazy keeps getting in there, but I think counsel and the witnesses tend to forget that Mr. Fugazy was not an employee of Diners' Club at that time. So first let's limit ourselves to Mr. Bloomingdale. I think we have Mr. Fugazy and Mr. Marx saying that Mr. Bloomingdale told them that Diners' had been receiving finances from Continental, that Continental had a position in Diners' Club, that it was expected that that position might be a gmented, increased, and that eventually in the end or ultimately, whatever word they happen to be using at the time, there would be a takeover of Diners' by continental. I think on that aspect, whether or not these plaintiffs got a misrepresentation to induce them to do anything in '67, they had not gotten enough to spell out a case, and I don' hink we should be required to have to deal with that on the defense. I think it should be dismissed and stricken from the case. There is nothing in that '67 period they said that didn't turn out to be true.

THE COURT: Their point is it didn't turn out to be true at the time it was supposed to happen. In other words, they have indicated, and I have some question about their position here, that it is not a question that the takeover did not take place, but that it took place later

than was allegedly represented to them, at a time when the stock of Diners' had gone down from a $65 value to, I believe they said, a $15 value. The question is really whether this is a misrepresentation within the purview of 10-b-5.

Do you have anything else to say? I will hear after youhave finished from Mr. Fredericks.

MR. SANTORA: On the '67 transaction, your Honor, they have had presented them to this court as two separate transactions. That is the way the plaintiffs have presented them to this court. In respect of the 1967 transaction, they say they were fraudulently induced to part with their assets because of a misrepresentation. All I am saying is the testimony that has been given by all four of these plaintiffs does not support that, and two of them say they know nothing. Marx and Fugazy say they were not given any specified time before the '67 closing, and I think that out of their own mouths they have precluded themselves from claiming that a misrepresentation was made to them, because the only thing we have heard here from Mr. Marx and Mr. Fugazy, they were told ultimately there would be a Continental takeover, which was true.

And if they sold the Fugazy Travel Agency in

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'67 in the transfer or in consideration of a representation that there would be a Continental takeover, then there is no misrepresentation, because that is, in fact, what happened.

THE COURT: I don't know that they can sustain that portion of their case, but they tehn say in '68 they were induced to part with certain benefits which they had on their representation that the takeover would take place within approximately two months of, I think it was, September, 1968.

Now, on that I would like to hear you.

MR. SANTORA: Well, I would say that the representations that have been received or have been testified to by these witnesses are not representations that can rise to the level of a 10-b-5 fraud.

For example, there is a question of materiality and reliance; there is a question whether or not it was reasonable in any way for these people to rely on the facts, if those were the facts.

And we must bear in mind that these people were not ordinary people. One was an investment bankers, and the other was an insider, the president of the corporation. Ratios were prepared by his own subordinates. I don't think they have made out a case.

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I don't want to get into areas of credibility. I think I have distinguished between '67 and '68. At least as to '67 it certainly emphasizes the lack of such a claim. But with '68 I think we are dealing with something else, the statement that they were misled without any supporting proof in the face of the facts that took place a year later. They had been told this for a year and it has not happened, and they never inquired, never checked.

The question is whether there was any reliance on a purported relation with Mr. Bloomingdale, who is not even in a position to speak for Continental. I believe they lack the showing of a material statement of misrepresentation that they relied on to their own detriment. I don't think they have made out a case on that. It is somewhat less clear than the '67 position. I won't dispute that.

THE COURT: Well, relative to Continental, for example, this afternoon Mr. Marx testified that in September of '68 he had spoken with Harold Johnson, of Continental, who indicated in connection with that take-over they were working on ratios and proxies, and Mr. Marx, if I recall, indicated that it was held out to him that the takeover would take place in the near future, which, I think, he characterized as 30 to 60 days. That

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is my recollection of the testimony. I don't have the transcript of the testimony in front of me. I have my notes.

MR. SANTORA: He said he got it from Bloomingdale and Fugazy.

THE COURT: First he was told by Bloomingdale that there would be a Continental takeover in 30 to 60 days, in September '68, at a price of approximately $65 a share. He said Mr. Fugazy in essence said the same thing. Both said they were preparing ratios. We have seen the ratios. Then he went on to testify, if my memory is correct, that in September of '68 he spoke with Harold Johnson of Continental, who said that they were working on the ratios and the proxies in connection with the exchange which was to be very shortly thereafter. That is my recollection.

MR. SANTORA: I thought you said Johnson said 30 to 60 days.

THE COURT: I don't recall it. It could have been said. I don't have it in my notes.

Is there anything else you want to add?

MR. SANTORA: With respect to both claims, the '67 and '68 claims, I think there is the application of the legal doctrine of para de liquator in this situation

and it seems to me that as a matter of law although this may be a matter of defense, it is applicable, I think when the testimony has established, as I believe it has, that the entire case is premised on the receipt of inside information, of inside trading, and so forth, I think all that is clearly prohibited.

THE COURT: They didn't trade. They were in a position of being locked in and they could not trade. If they had been free to trade I think they would have traded and taken the chance of being found out for possession of insider information. But I don't see they traded. What you are saying is they should not benefit.

MR. SANTORA: If they amended their employment agreement in the matter of 38,000 shares of stock with a market price of $50 knowing what the future is going to hold, you are talking about a case premised on the fact that they received information that something was going to happen, and they decided to take the stock on information that was completely insider.

THE COURT: It was not completely insider. You brought out on your cross this afternoon that rumors were rife in the marketplace, and I don't think you can hold to that position.

MR.SANTORA: Only with respect to timing.

That is the question they raise. We say rumors were going around for two or three years, and since they place so much importance on the representation, there is the matter of timing.

Everyone knew for three or four years there was this involvement, but no one knew when the transaction was going to take place, and that is what the insider position is all about. That is what they relied on. Through their own information they would not have taken the Diners' stock, but for this information. That is their whole case.

As to the registration statement claim, I don't think they should be allowed to maintain that any more. I think it is a confusing, irrelevant thing. It is going to put us in the position of offering evidence from our side of the fence. It is totally silly. From their own mouths there is not one of them who has anything to say, and it is a claim hanging in air without one piece of supporting evidence.

I think that claim should be stricken at this point.

THE COURT: I think they are in trouble on that one, frankly, for reasons even beyond what you have adverted to.

Is there anything else?

I will hear you, Mr. Fredericks.

MR. FREDERICKS: I wonder if you would permit Mr. Tllan to argue.

THE COURT: He may.

MR. TOLAN: May it please the Court, as to the 10-b-5 requirement --

THE COURT: What does 10-b-5 require as far as representations?

MR. TOLAN: That a material representation be made of a material fact when the person making the representation knows that it is false or has reasonable grounds to believe that he cannot make the statement because he does not know if it is true or not. And if the person he is making it to relies upon that representation and parts with something in turn for stock, it is a misrepresentation that has been made in connection with the purchase or sale of a security.

One, they got Diners' stock in October of 1967. Therefore, you have the sale of a security. Two, did they rely on it? Each of these witnesses, particularly Mr. William Fugazy and Mr. Marx, specifically stated, not only on direct, but on cross examination -- and a specific question was not allowed to be asked by us,

but by our adversary -- that they, in fact, relied on those statements and would not have made these agreements if the statements had not been made to them.

THE COURT: Yes, they testified as to reliance, and I am not about to take that away from the jury.

MR. TOLAN: Lastly, has a misrepresentation been made?

THE COURT: That is the real question, I think, has a material misrepresentation been made?

Now, it is not of a past or present fact; it is of a future event which, in fact, did take place, but later in point of time. Would you address yourself to that, because I think that is really what we are talking about.

MR. TOLAN: I will address myself to it in both aspects: Has it been a misrepresentation and has it been material?

"Material" has been defined by the courts of the Southern District, as wellas the Second Circuit, as anything that would or could influence an investor in making his decision whether or not to give up his property in exchange for securities that he receives. I think in this case it clearly meets the test.

Secondly, has there been a misrepresentation. When Mr. Bloomingdale states and Mr. Liftig, who has been

shown here to be an agent of Bloomingdale and Diners'.

THE COURT: I am not sure. When you pay a man? I see him as an negotiator and he receives a commission of a finders fee out of their 62,000 shares, so that they wound up with 57,000.

MR. TOLAN: You heard testimony from Mr. Marx that this was structured that way by Diners' and that the $57,000 came to them, and the 5,000 was structured by Diners' Club for tax purposes.

THE COURT: I am not going to dwell on that, because I don't think the Liftig status is particularly germane to the final question, because shortly thereafter you have Bloomingdale coming on the scene.

MR. TOLAN: That is correct. So you have in the period from June, 1967 these meetings in New York City, in offices, car rides coming from Jersey to New York, going from New York to Harrison, meetings, and you have Bloomingdale, who is Mr. Diners' Club. He is the chairman of the board and chief executive officer. You have Mr. Diners' Club at that time telling them, "Come on, fellows, we need your franchises, we need your Bill Fugazy. And don't worry, you are going to get your money because there is going to be a takeover by Continental of Diners' Club and it is going to be in the

foreseeable future, it is going to be immiment, and you are going to get your money, cash, don't worry. Bill Fugazy, you are going to be made a millionaire."

Your Honor, that I submit is not full, fair, adequate disclosure required by the securities laws, requires by the courts, the Second Circuit, or any other court that I am aware of in terms of securities laws.

THE COURT: Do you have a case on which you can rely where a similar fact existed,the representation of a future event being made and the representation fulfilled, except it was not fulfilled in point of time? Often we have cases where a representation is made and the thing does not happen. Here is happened but it happened later in point of time. Do you have a case which would support your argument in the contexts of the facts as presented here? You are alleging a 10(b)5 violation.

MR. TOLAN: I have cases that say a misrepresentation is a misrepresentation when one says something is going to happen in the immediate future, imminently,and it does not happen, because as I understand the thrust of my colleagues' argument, you have Mr. Diners' Club, Mr. Bloomingdale, in '67 having no basis in fact for making any such statement.

THE COURT: If your clients stand here and say

they relied on it like it was the gospel, that leaves me somewhat incredulous. However, I am troubled by how much I can take from the province of the jury. My problem is whether there is enough of a case on reliance to require me to put the question to the jury.

Is there anything else?

MR. TOLAN: I submit there is with respect to October '67. I am addressing myself to '67, when you have Mr. Bloomingdale, the chief executive officer and the president having these meetings, going to Jersey, flying to Paris with Mr. Fugazy, and then bringing him down to Mr. Herd, and Mr. Herd says there is going to be a marriage prior to October 30, 1967.

Your Honor, that is a misrepresentation of fact that this was going to occurin the reasonable foreseeable future and imminently.

Now, if it did not occur for two and a half years later, that is not within the reasonable, foreseeable future or imminently.

THE COURT: Out of your own clients' mouths I saw one of the transcripts of his examination where when he was asked if Mr. Bloomingdale said within two months or something like that, the answer was no.

MR. TOLAN: Mr. Marx testified in his deposition

that he did not give a specific schedule. He said it was going to take place in the foreseeable future, it is imminent.

THE COURT: That together with Mr. Marx' 40 years of experience as an investment banker leaves me at least incredulous. The question is whether my incredulity on the subject will rise to being incredulous as a matter of law.

MR. TOLAN: It might be incredulous to you, which I hope it is not, but I would submit to your Honor that even sophisticated businessmen, as this district has held here, are entitled to a fair presentation of the facts when they are doing a deal in connection with securities.

Secondly, there is no question in my mind, your Honor, that the question which you raise, with respect to '67 has been met and must go to the jury with respect to October, 1968.

THE COURT: I am more inclined in your favor on that one.

MR. TOLAN: And, lastly, with respect to the prompt filing of a registration statement, your Honor, there is evidence here that shows in April 1968, they requested a registration statement. The financial statements made

by the Touche-Ross accountants were ready on June 6th. Indeed, they had sent out those financial statements and the annual report and proxy statements to their own shareholders on June 19, 1969. What did they do? They waited until August 28, 1969 before they filed the registration statement.

The documentary evidence shows, your Honor, that Mr. Herd and Mr. Johnson are saying, "Don't worry; don't do anything about it;Marx is just trying to get us to buy his 50,000 shares."

Your Honor, that is demonstrably, and the jury can believe, they did not promptly file the registration statement. In the words of Mr. Marx, although it was stricken, but I think it is prophetic, the jury can find they dragged their heels. And, secondly, your Honor, not only did they not file it, it never became effective, and they had to use their best efforts to make it effective.

THE COURT: I saw the SEC letter of comment and I did see Mr. Marx' response to the payment of the registration fee.

Is there anything else?

MR. TOLAN: With regard to the Court's question, one of the obligations of a registrant is to file an S-1 in compliance with the securities laws of the

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United States of America.

When you get a deficiency letter, it is not a letter of comment, it is a deficiency letter. Now, there are three deficiency letters, and there are some that are pro forma, but none that I am aware of where you have one with respect to the normal stuff and then another coming at another period of time with regard to the accounting.

So I think it is clear, your Honor, that a case has been made out to go to the jury for failure to use their best efforts and promptly file it and to use their best efforts and make it effective, because, your Honor, it never became effective. It never became effective, your Honor.

And I submit, your Honor, there is sufficient evidence here if believed by the jury, which they are entitled to do, and the documentary evidence supports it, to sustain a prima facie case and find for the defendants on each and every one of these causes of action.

THE COURT: The Court reserves decision and counsel are requested to be present here at 9:45 a.m. I have a sentencing at 9:30 a.m. I have told the jury to be here at 10 o'clock.

Good night, gentlemen.

(Adjourned to May 15, 1975, at 9:45 a.m.)

A1347

WITNESS INDEX

Name	Direct	Cross	Redirect	Recross
Otto Marx, Jr. (Resumed)		707		

EXHIBIT INDEX

Defendants	Identification	In Evidence
H-1	738	
H-2	738	
H-3	738	
H-4	738	
N	760	
N-1	760	
N-2	760	
O	823	828
P	878	878
Plaintiff		
12	890	890
14	890	890
45	892	893
46	892	893
47	895	
48 & 49	900	48 900

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Marx & Co., Inc., et al.

v. 72 Civ. 4324

The Diners' Club, etc.

New York, New York

May 15, 1975
10:00 a.m.

- - -

(Trial continued.)

- - -

(In open court, jury not present.)

THE COURT: Gentlemen, the Court has considered the defendants' motion to dismiss and disposes of the motion as follows:

In connection with the 1967 acquisition, plaintiffs allege that defendants knowingly misrepresented that the defendant Diners' Club would be acquired by Continental. I have searched the record and have concluded that inasmuch as the takeover did in fact occur, albeit in early 1970 and inasmuch as there were certain intervening events which occurred in the fall of 1968, which have led the Court to conclude that there was no reliance on the part of the plaintiffs regarding the timing of the Diners' Club takeover by Continental, at least insofar as the 1967 acquisition was concerned, no evidence that the plaintiffs

considered themselves to have been defrauded when that action did not take place within a few months of 1967, in view of their entering into the new agreement in 1968, at which time the stock, for example, was up, and it was hopeful that it would be higher, the Court concludes that relative to the first claim, which relates to the 1967 acquisition, the plaintiffs have not made out a prima face case. Accordingly, the motion to dismiss that portion of the plaintiffs' case is granted.

In connection with the 1968 amendment of the employment agreements, the plaintiffs allege that the defendants knowingly misrepresented that Diners would be acquired by Continental a few months later, to wit, in October or November of 1968. Reviewing all of the evidence which was presented by the plaintiffs, the Court has concluded that there are questions which have been presented on the issues whether the plaintiffs were misled, whether there was reliance by the plaintiffs and whether the alleged representations were in fact made and were knowing misrepresentations, which are questions which the Court believes should be left for the jury.

Accordingly, in connection with the 1968 amendment of the employment agreements and the claim which flows therefrom, the defendants' motion to dismiss is

denied.

Turning to the third of the plaintiffs' claims, the one which alleges a failure to promptly file a registration statement and a failure to use best efforts to cause the registration to become effective, the Court would like to examine either Plaintiffs' Exhibit 27 or Plaintiffs' Exhibit 28, which are identical -- that's the letter dated April 16, 1969 and also Plaintiffs' Exhibit 5, the purchase agreement.

The Court now has the two exhibits in front of it, having been handed Plaintiffs' Exhibit 28 and Plaintiffs' Exhibit 5, both in evidence.

Incidentally, in this regard, the Court does note -- and I think this is a postscript to the first part of the Court's decision -- that rather than having considered the agreement of October 10, 1967, to have been vitiated by fraud, the demand for registration relies upon that agreement, particularly Paragraph 10.2(b).

As I say, that's just a postscript, because the ruling relative to the first claim has already been made.

I would ask counsel -- this is what troubled me last night as I was considering this matter -- which shares of stock are referred to in the letter? It would seem to me the letter refers to the registration of the 57,000 shares

of stock which were given net, forgetting Mr. Liftig's commission, under the October 10, 1967 agreement. I ask counsel that because in your trial memorandum you talked about 66,000 shares.

MR. FREDERICKS: Your Honor, there is a document somewhere, and we will pull it out, that includes the stock shares as part of the same legended shares, so we are talking about all the shares that he acquired.

THE COURT: I would think that the stock shares would represent something which is duplicative of the claim in your second claim. I would think that at most the third claim should only relate to the 57,000 shares originally given, because the second claim, it seems to me, seeks damages in connection with other shares, which were given in connection with the 1968 amendment.

MR. FREDERICKS: Your Honor, that's an alternative pleading, because if the jury were to find that there was no fraud in connection with the '68 amendment they could still find that they failed to properly register the shares, which include those '68 shares. That is to the second cause itself an alternative position. I agree with the Court that if the jury found that there was fraud in connection with the second claim and then awarded damages, there would be a solution on the failure to

register for those shares having been fuly compensated, but if they didn't, they should be included in the whole cause of action.

THE COURT: Well, there may come a time -- whether you have reached it already or whether you will reach it before the case goes to the jury -- where you will have to elect on that. I mention that and I am limiting my comments to approximately 9,000 shares.

In any event, after having reviewed the two exhibits to which I have made reference and having considered the testimony, I have concluded that the questions, whether the defendants did in fact fail to promptly file a registration statement and did in fact use their best efforts to cause the registration to become effective, having been sufficiently presented by the plaintiff to cause the Court to conclude that the plaintiff on this matter has made out a prima facie case. This is a matter which I will consider again at the close of all of the evidence.

Accordingly, the defendants' motion to dismiss the third claim, that is, the claim bottomed on the failure to promptly file a registration statement is denied.

MR.FREDERICKS: Your Honor, may I be heard briefly, please.

THE COURT: If it is re-argument, no. If it is

clarification, yes.

MR. FREDERICKS: Well, it is very difficult for an attorney to characterize what it is. I would merely like to take my exception on the record to your ruling on the following grounds:

One, there was no testimony in this record about a takeover by Continental at any time. It has been argued by counsel. The only information we have had, the only evidence the plaintiff presented on the Continental was a tender offer and statements that these individuals sold their shares under a tender offer to acquire shares of stock. There has been no evidence of any kind to indicate that Continental fully acquired and took over Diners' Club.

Secondly, your Honor --

THE COURT: I think that cuts against your case even more, but I am not going to comment further.

MR. FREDERICKS: Your Honor, there was no take-over. Our position is that they never took this company over, notwithstanding their representations, and there has been no evidence to the contrary on the plaintiffs' case.

Secondly, your Honor, as a matter of clarification to the Court, since the question your Honor says is that there is no reliance, is your Honor taking the position that as a

matter of law the plaintiffs have introduced no evidence or insufficient evidence as a matter of law to put the question of reliance on the jury?

THE COURT: Yes.

MR. FREDERICKS: Thank you, your Honor.

THE COURT: Do youwant to add anything, Mr. Santora?

MR.SANTORA: No, your Honor, especially in light of your comment about reviewing the third leg of the motion at the close of defendants' evidence.

THE COURT: Very well. Are you ready to proceed?

MR. SANTORA: Yes, your Honor.

THE COURT: Bring in the jury.

(Jury enters the courtroom.)

THE COURT: Good morning, ladies and gentlemen.

First I want to apolotize for last night, and I do hope that those of you who had cars parked in garages found that the garage tender was still there and was able to release your car and those of you who went home to husbands and wives did not find yourself being served with any process.

Ladies and gentlemen, we are stating a little late this morning. I think I mentioned to you that I had another matter on at 9:30, a different matter, a criminal

* * * * *

MR. FREDERICKS: Also, I have to make an objection on relevancy, your Honor, and I would -- I would again request a bench conference.

THE COURT: No. Overruled. If you want to make a statement, you may make it from there.

MR. FREDERICKS: I would prefer to make my statement outside the presence of the jury.

THE COURT: Very well, then counsel will proceed.

Q At any time in 1966, Mr. Piscatella, did you have occasion to speak to Mr. Marx?

MR. FREDERICKS: Objection, your Honor.

THE COURT: Yes and no.

THE WITNESS: It was objected --

A Yes. I had occasion to speak to Mr. Marx.

Q Was that on the telephone?

A No. It was in person.

Q Will you tell us where you met him?

A In his apartment, on Central Park East, I believe.

Q Do you recall when that meeting was?

A Oh, roughly -- this is guessing, because it is back nine years, because I would roughly say March or April of 1966, I believe.

Q And was anyone else present besides yourself and Mr. Marx?

A Yes, Dr. Frankolini was the chairman of my company from Italy, and Mr. Michael Sandoni.

Q And will you tell us what Mr. Marx said and what you said to Mr. Marx?

MR. FREDERICKS: Objection, your Honor. Again I request a bench conference on the matter. It is wholly irrelevant to this point of the proceedings.

THE COURT: Well, I know of a document which was shown to Mr. Marx which bears some very familiar names. Under the circumstances I am going to permit the inquiry to proceed.

MR. FREDERICKS: Will your Honor again deny my request for a bench conference?

THE COURT: Absolutely. You may continue to make them and at an appropriate time I will hear you on everything, but at the moment I regard the material being inquired into as similar to that which was inquired into duri the plaintiffs' case, a valid defense and counterclaim material and under the circumstances your application for a bench conference at this time is denied.

MR. FREDERICKS: Your Honor, may I comment that I think that the discussions we have had this morning may affect that ruling and affect the entire relevancy of this entire line of questioning.

* * * * *

Q Can you tell us what, if anything, happend after that meeting, Mr. Piscatella?

A Well, after that meeting we were given in my office of Pierre Busetti a memorandum prepared by the Fugazy Travel Bureau. I don't know who prepared the memorandum, but I assume their attorneys or someone prepared it.

MR. FREDERICKS. I move to strike.

THE COURT: Tell us what you assume. A memorandum was prepared?

THE WITNESS: And I believe it was delivered to my office by Mr. John Summerlin. The memorandum--do you want me to say what is in the memorandum?

THE COURT: No.

Q Now, Mr. Piscatella, I show you a document which is marked Defendants' Exhibit H for identification. I ask you, sir, if you recall ever having seen that document before.

A Yes, that is it.

Q Will you please tell us what it is.

MR. FREDERICKS: Your Honor--

THE COURT: It is a memorandum. We know that. I don't want him to read from it or characterize it.

That was delivered to you by Mr. Summerlin?

THE WITNESS: I believe Mr. Summerlin delivered

* * * * *

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(In the absence of the jury.)

(At the side bar.)

MR. SANTORA: The question is this as far as we are concerned, part of our counterclaim is going to be that the franchise operation was constructed entirely from scratch in 1966 as a conscious effort to defraud a potential purchaser. Perhaps not with Diners' in mind, perhaps with somebody else in mind like these people or anybody else who happened to be along the path.

Part ofthe proof of our counterclaim is not going to be that this thing didn't turn out well, but that was never designed to be anything but, that it was designed by the brain of one of them --

THE COURT: If you can present proof of admissions which one or another of them made even in 1966 I will accept that, but I will not accept the self-serving positive statements of this man stating "I evaluated it and in my opinion it was worthless."

MR. KAY: Your Honor, what we would like to have Mr. Piscatella tesify to is that he had discussions with Mr. Fugazy regarding the franchsing concept and that in those discussions he evinced knowledge on the part of Mr. Fugazy of the pitfalls which was never communicated to the company at the time it was presented to them, so that

Mr. Fugazy's presentation with Mr. Marx of the franchising concept at the time in '67 when it was being sold to the company was a knowing falsehood and is part of the basis of our counterclaim.

THE COURT: If that is the thrust of the proof, I will not permit it.

MR.SANTORA: All right, your Honor.

(Recess.)

(In open court; jury present.)

THE COURT: Mr. Santora, you may proceed.

BY MR. SANTORA:

Q Now, Mr. Piscatella, a moment ago you were telling us about some discussions you were having with Mr. Marx about the various documents you have before you, Exhibits H and H-I.

Now, Mr. Piscatella --

MR. FREDERICKS: Your Honor, I am going to object to leading questions. That isn't what his testimony was.

THE COURT: He hasn't really done anything. We have just had a recess. He made a brief comment for continuity's sake. I am sure the jury knows that counsel's comments, both yours and his aren't evidence. The evidence comes from the mouth of the witnesses.

Q Other than that you have told us was there any

further discussion that youhad with Mr. Marx or Mr. Marx had with you about any of the documents Exhibits H through H-4 that you have before you, sir?

A Well, we had a final discussion with Mr. Marx about a memorandum that I prepared or had prepared as a rebuttal, not a rebuttal but a re-do of their memorandum to us and we just discussed that.

THE COURT: That was H-1.

Q And do you recall what you said to Mr. Marx and what he said to you?

MR. FREDERICKS: When was the meeting, where was it and who was present, please?

A The meeting was in New York City, and in the presence of myself and Mr. Marx and Mr. Miller who was representing Pierre Busetti.

THE COURT: How long after the meeting you have just described, where Mr. Marx had said Pierre Busetti's offer wasn't acceptable -- how long after that meeti was this next meeting?

THE WITNESS: Ni, that was the meeting I am referring to.

THE COURT: That's the same meeting?

THE WITNESS: Yes.

THE COURT: You haven't finished telling us

about it?

THE WITNESS: Yes.

THE COURT: I was confused.

THE WITNESS: That was the same meeting, and I said to Mr. Marx that this is the basis on which we would accept the Fugazy Travel Bureau, and Mr. Marx said that this was unacceptable to him, and that was, I think, the last meeting that I have ever had with Mr. Marx, and that was some time in June, roughly in June of 1966.

Q And did anything further happen in the discussions beyond what you have told us about?

A No. It just seemed like there was no more contact. It had just washed out, and I had written a letter to Mr. Marx thanking him for the negotiations and regretting that we could not get together and terminating any further discussion or plans for acquisition.

MR. SANTORA: Your Honor, at this point I would like to offer Exhibits H through H-4 into evidence.

MR. FREDERICKS: Objection, your Honor.

THE COURT: Let me see them.

I am going to sustain the objection at this time. It maybe that as your case progresses, you may want to re-offer them, but at this time I am going to sustain the objection.

MR. SANTORA: I have several grounds. As an offer of proof -- I can say it in our out of the hearing of the jury, as your Honor prefers.

THE COURT: Say it now, speak up.

MR. SANTORA: I would like to offer the documents from the standpoint of the credibility of the plaintiffs' witnesses. I think the witness has laid a foundation, stated the meetings and discussions he had, in conjunction with the plaintiffs' witnesses, especially Mr. Marx, that these documents belong in on the credibility issue.

THE COURT: I think you would be proving credibility by extrinsic evidence and therefore I would be disinclined to receive the documents on that basis.

Let me give you an example. H-1 was prepared by this witness. I don't recall H-1 as being prepared by Mr. Marx. The best we have there is that it was delivered by Mr. Summerlin.

The other material I dn't think would be admissible, either.

At least on the state of the record as it exists now I am going to sustain counsel's objections.

Is there anything else which you wish to ask this witness?

(Pause.)

* * * * *

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Q Do you recall when this document was first prepared?

A No, I do not. After the letter of intent or the memorandum of intention, but how soon--it is a complex document and I would think that it could have taken 30 days for the attorney to prepare the first draft.

It might have taken 45. I can't give you the exact days, because I have not built up copies of it.

Q Do you recall having any discussion with anyone from Fugazy Travel on this agreement, Plaintiffs' Exhibit 5, prior to the execution of the agreement?

A I am certain that there were discussions. Specific conversations I can't recall, I can't give you any. There were points of differences as there are in any acquisitions in terms of positions of any of the parties involved in a transaction like this.

THE COURT: This was a negotiated transaction?

THE WITNESS: Yes, your Honor.

THE COURT: Each side was represented by counsel?

THE WITNESS: Yes, your Honor.

THE COURT: And there were numerous discussions?

THE WITNESS: Yes, your Honor.

THE COURT: And people's positions changed during the course of the discussions?

THE WITNESS: Yes, your Honor.

Q By the way, during these discussions do you know how many there were between the time the agreement was prepared and the time it was executed?

A I can characterize it as many. I cannot tell you how many, though.

Q Can you tell us any persons with whom you discussed this agreement prior to its execution?

A I probably talked--

THE COURT: No, not whom you probably talked with.

A As I recollect, I talked with each of the individuals I previously mentioned as having participated in the development of this document.

Q Do you recall anything that Mr. Marx said to you about this document prior to its execution?

A Anything specific, no, nothing specific.

Q Do you recall anything Mr. Fugazy said to you about the document after it was prepared and prior to its execution?

A Nothing specific.

Q In answer to his Honor's question you mentioned

changes. Do you recall any specific changes that were requested?

MR. FREDERICKS: Objection.

THE COURT: Overruled.

A I would have to go through the development of documents and on a line-by-line inspection to see what the changes were. There was a two-month rather lengthy negotiation as to what was going to become the basis of arrangement.

Even though the original characterization in the memorandum of intention ended up in this document, there were a lot of points, and I would have to go through it line by line to give you a truthful answer.

Q Now, Mr. Hays, please look at paragraph 1.2 of the agreement, entitled "consideration to sale and transfer."

Can you tell us prior to the execution of this document whom, if anyone, from Fugazy Travel you discussed the matters contained in that document with?

MR. FREDERICKS: Objection. Leading the witness.

THE WITNESS: Go back one question. I will sustain the objection.

Q Do you recall having any discussions with anyone Mr. Hays, about the matters concerned in paragraph 1.2

disregard everything after that.

Q Mr. Asch, you have in your hand what has been received in evidence as Plaintiffs' Exhibit 30. Can you identify that document?

A Yes, sir.

Q Can you tell us what it is?

A It is a registration statement on form S-1 as filed by Diners' Club with the Securities and Exchange Commission on August 28, 1969.

Q Could you tell us what a registration statement is?

A A registration statement is a document which under the rules of the Securities and Exchange Commission is required to be filed prior to the offering of any securities which require registration. It contains a mass of information in addition to the financial statements of the corporation involved. It has to show a complete description of the business, all material contracts, ownership of management, ownership of stock by stockholders, and a wide variety of subjects, all to be furnished pursuant to the rules and regulations of the Securities and Exchange Commission.

Q Do many large corporations file registration statements on an annual or more frequent basis?

A Yes, sir, particularly utility corporations, which have frequent financing.

Q You testified that you had worked for an investment banking firm for a period, Mr. Asch?

A Yes, I was an executive with two investment banking firms for something like 15 years in the aggregate.

Q As to companies that filed registration statements on a regular basis, do they use the previous ones and mark them up to file their next registration statement?

MR. FREDERICKS: I object, your Honor.

THE COURT: Sustained.

Q When prior to 1969, Mr. Asch, had Diners' Club ever previously filed a registration statement?

A Diners' Club filed a registration statement with the SEC in the fall of 1955, immediately prior to the first public offering of Diners' Club securities, 1955. I believe it was in October.

Q So that after Mr. Marx requested that a registration statement be filed, Diners' Club had to prepare one from scratch?

MR. FREDERICKS: Objection, your Honor.

THE COURT: Sustained.

Q Were you at all involved in the preparation of this registration statement?

A I was.

Q Can you tell us what you did?

A My primary responsibility in this connection was to assemble and prepare and coordinate the data dealing with the description and history of the business, the description of the business in all of its facets, the credit business, the travel business, the collection agency business, and various other businesses in which we were then engaged.

Q And what other activities had to be accomplished in order to prepare this registration statement?

MR. FREDERICKS: Objection.

THE COURT: If you know.

THE WITNESS: I do know, your Honor.

THE COURT: I will let him testify.

A Naturally, the financial statements had to be filed, legal opinions and a large number of matters had to be obtained, and I think that in general covers what was involved.

Q Does the registration statement contain a table of contents, Mr. Asch?

A It does.

Q How many items are listed in the table of contents?

MR. FREDERICKS: The document speaks for itself. It is in evidence.

MR. McKAY: I am going to save the time of showing it to the jury.

THE COURT: I will let him answer it. Of course it is in evidence; it speaks for itself.

A There appears to be 21 items, and there is the cross reference sheet pursuant to Rule 404C, whatever that is.

THE COURT: In any event the sheet shows 21 different items or headings? Is that correct?

THE WITNESS: That is correct, your Honor.

Q Mr. Asch, the purpose of a registration statement is to enable shares covered by it to be sold on the public market? Is that correct?

A I would describe it somewhat differently. The purpose of a registration statement is to service the vehicle for an issue of securities to file the necessary information required by the rules and regulations of the Securities and Exchange Commission before any stock which requires registration can be offered to the public or to anybody else, if it is going to be a public offering.

Q Now, after a registration statement is filed, what is the next event that has to take place before the

shares can be disposed of, if you know?

MR. FREDERICKS: Objection, your Honor. This is not an expert here. Asking what the company does is fine, but anything beyond that I think is improper.

THE COURT: Do you want to qualify him as an expert or do you want to ask what the company did? If you want to ask what this company did, I will permit it at this point.

Q Did there come a time, Mr. Asch, when the Securities and Exchange Commission responded to the registration statement that was filed on August 28, 1969?

A Yes, they made certain comment.

Q I show you what has been received in evidence as Plaintiffs' Exhibit 39. Can you read the date on that, please?

A This is a letter from the SEC dated October 16, 1969.

Q Is that the first comments to your knowledge received from the Securities and Exchange Commission?

A Yes.

Q Can you read the last paragraph in that letter for us, Mr. Asch?

A On page 5 of the letter--I believe this is the beginning of the paragraph--it reads as follows:

"Additional comments will be furnished as soon as possible upon completion of the examination of the registration statement by the accountants. Every effort is being made to complete this examination as early as possible.

"Sincerely yours,

"William C. Wood, branch manager."

THE COURT: What is the date of that letter?

THE WITNESS: October 16, 1969.

Q Do you know when that letter was received by Diners' Club?

A I can't be precise. I assume it was received a day--

MR. FREDERICKS: I will object to his assumption.

A I don't know when it was received.

Q I show you what has been received in evidence as Plaintiffs' Exhibit 40. Does that refresh your recollection as to when the October 16th letter was received?

A It does.

Q Can you tell us the date on Plaintiffs' Exhibit 40?

A The date on this exhibit is October 20, 1969, and it refers to receipt of letter of comment regarding a registration statement "which we eceived this morning."

The quotes are mine, your Honor.

Q Did there come a time when additional comments were received from the Securities and Exchange Commission?

A Yes.

Q I show you what has been marked Defendants' Exhibit for identification MM.

A Yes?

Q Does the attachment on that refer to additional comments that were received?

A Well, this is a letter from counsel dated October 31, 1969, which refers to financial comments from the Securities and Exchange Commission received by telephone on the afternoon of October 31, 1969.

Q You were sent a copy of this letter?

A Yes, sir.

MR. McKAY: May we have a bench conference, your Honor?

THE COURT: Step up.

(At the side bar.)

MR. McKAY: Your Honor, I saw this letter and the other letter which we are going to introduce for the first time last week in Mr. Asch's file, and I supplied a copy to them. It simply is comments received from the SEC by telephone.

The other letter which we are going to introduce is a response from Diners' Club to the comments of the Securities and Exchange Commission.

THE COURT: Is there an objection to this?

MR. FREDERICKS: Yes, your Honor. The basis of my objection, I got a letter from Mr. Kay advising me these things were inadvertently left out of the pre-trial order. They include a letter that has been marked MM, the letter dated from the Securities and Exchange Commission November 5, 1969, and a letter from the Securities and Exchange Commission dated November 11th, and a prospectus of the Continental Corporation.

THE COURT: When did you receive this?

MR. FREDERICKS: I got this May 14th.

THE COURT: Five days ago.

MR. FREDERICKS: We specifically requested these documents. They are not in the pre-trial order and we don't have them. Particularly what disturbs me is this comment in the letter from the SEC. It refers to preliminary proxy material submitted to the division on October 20, '69.

I have never seen that proxy material. Had I got this document when it was called for I would have had an opportunity to discover what that proxy which was filed

simultaneously with this registration statement was, having specifically asked for it, and getting a response, "It's not in the pre-trial order; don't worry about it," now to have it delivered to me with information I don't have I find it totally objectionable.

MR. McKAY: Your Honor, I was not aware that these documents existed and found out for the first time when Mr. Asch came to testify. I don't think they are earth-shaking.

THE COURT: Show me how you are surprised. You have had five days' notice of this, counselor. If you have no other objection, I will rule on tihs. If you have any other opinions you wish to make, I will hear you.

MR. FREDERICKS: I have had five days' notice in the middle of trial which we were going on and conducting on a daily basis.

THE COURT: We did not work Friday.

MR. FREDERICKS: That is correct, and at that time we were busy preparing responses and briefs and other material.

I specifically asked for these documents and I got a response, "They are not in the pre-trial order; don't worry bout it."

And now I get the documents. What am I supposed

to do, your Honor, when I see in here a reference to proxy material submitted to the division?

MR. TOLAN: In our letter dated May 5th, item 5, we asked them for that.

MR. McKAY: There were many requests in that letter.

MR. TOLAN: I don't believe that items 10, 12 and 25 are included in the pre-trial order. In any event, I do not believe we have copies of these documents.

THE COURT: It would appear to the Court that when he found these, he furnished you copies.

MR. FREDERICKS: I specifically asked for these and then they suddenly appear. Then I find there are references to other materials which we still don't have. I suggest, your Honor, that surprise is not something when counsel requests something and you deny his request and then come in and give it to him in the middle of trial and say, "How are you hurt when you have five days," since we specifically requested it and it contains information we have not even seen, that I still haven't got.

THE COURT: You mean in preparation of this major case you did not make an independent inquiry of the public records of the Securities and Exchange Commission? Is that what you are telling the Court? You are claiming

surprise?

I want to know if you did that.

MR. FREDERICKS: We did not know about this proxy material and this proxy statement.

THE COURT: I asked you a question.

MR. FREDERICKS: Your Honor, we did not. I did not personally make a personal inspection of the Securities and Exchange Commission files.

THE COURT: And this case has been pending five years.

MR. FREDERICKS: Yes.

THE COURT: I don't find that there is sufficient surprise here, you having received five days' notice. I am not going to preclude this information, which appears to be relevant and material to your third claim.

Objection on the ground of surprise is overruled. If you have anything else you wish to add, you may do so.

I would suggest, however, counsel,if you are going to make an offer--I am now speaking to counsel for the defendant--that the offer be full and complete.

MR. FREDERICKS: I would like the production of that proxy material.

THE COURT: Yes, I think you should.

MR. FREDERICKS: And everything in that letter.

MR. McKAY: When you say "that letter," I told him I would try to find out.

THE COURT: Do you have the material?

MR. McKAY: No.

THE COURT: I suggest on rebuttal, gentlemen, you subpoena the records of the Securities and Exchange Commission; I am now speaking to counsel for the plaintiffs.

If counsel for the defendants have copies, they are to furnish them. These matters took place six years ago. They can't produce anything that does not exist.

Speaking to counsel for the plaintiffs, get them from counsel for the defendants, who should produce them. Or I suggest you subpoena them from the files of the Securities and Exchange Commission.

MR. SANTORA: We will call up our office and see if we can find anything up there and we will produce them if they have them.

THE COURT: This case has been here for some five years--and I speak to counsel for both sides--I want a full presentation of this case before this jury so they can evaluate it.

I don't want anything held back by anybody.

There is an offer before us. Is there any other objection to be made by counsel other than the one made at the side bar.

MR.FREDERICKS: I object, your Honor. There is no proper foundation. The document appears to be hearsay.

THE COURT Sustained on that basis. Not through this witness. He didn't prepare it. He didn't have the conversation.

Mr. Fredericks insists you call someone who would be competent to testify as to this document.

Is that your position?

MR. FREDERICKS: This appears to me to be hearsay.

THE COURT: You want a witness called?

MR. FREDERICKS: Yes, your Honor.

THE COURT: Sustained.

Q Mr. Asch, did there come a time when you responded to any of the comments of the SEC?

A Yes.

THE COURT: SEC. That time was, I believe, early in November of 1969.

Q I show you what has been marked for identification as Defendants' Exhibit NN. Can you identify that document?

A Yes, I can.

Q Is your signature on the third page?

A It is. It is a letter to the Securities and Exchange Commission from the Diners' Club, Inc. dated November 5, 1969 in response to the comments relating to the registration statement.

Q And that letter was sent by you on or about the date it bears?

A Yes.

THE COURT: That date was November 5, 1969?

MR. MC KAY: Yes, your Honor.

VOIR DIRE EXAMINATION

BY MR. FREDERICKS:

Q Mr. Asch, that document that has been marked for identification contains handwriting above and beyond the typewritten. Can you identify that handwriting?

A That is my handwriting.

Q You placed those writings on there?

A It is my handwriting so I would have had to have placed it on this note.

Q Can you tell me the reason why you placed those notations on there?

A I believe these are telephone numbers of some people at the SEC with whom we were discussing this matter.

Q Was that placed there before you had the telephone conversation or after?

pgbr 3 Asch-direct

A I can't recall. It might have been after.

Q Could it have neen before?

A Could have been but I don't recall.

Q I notice on this letter here you refer to some other things filed at the SEC, preliminary proxy material.

A Yes, that is correct.

Q Did you participate in the preparation of that material?

A That was prepared principally by counsel. I may have participated.

Q When you say "principally by counsel", did you principally prepare the S-1?

A I principally prepared that part of the S-1 which relates to the description of the business.

Q And the rest of it was prepared by counsel.

A By various people.

Q You did participate in this preliminary proxy material?

A Yes, I did.

Q Do you have copies of that material?

A I'm sure that there is a copy of the proxy material. It is related to a special meeting of shareholders on November 14th or November 19, 1969.

Q Where is that material?

A It is a matter of public record. It is a matter of notice of the meeting.

Q Do you have copies of that?

A I have copies.

Q Do you have copies of proxy material that is referred to in your letter of November 5, 1969?

A That material would be a draft of the notice of meeting.

Q My question is simply: Do you have copies of the material, the preliminary proxy material, submitted on October 28, 1969 which is referred to in your letter of November 5. I doubt the preliminary materials. I have a copy of the final notice of special meeting.

Q Where do you have that material?

A A notice of the special meeting?

Q The materials that are referred to --

A Just asecond. You asked me if I had preliminary materials. I said no. I have a copy of the notice. I have a copy in my briefcase.

Q In your letter you refer to certain proxy material; is that correct?

A Yes.

Q Do you have copies of the materials that you are referring to?

A I am not sure. I wuld have to check my files. I doubt it very much.

Q Do you know --

MR. MC KAY: He is arguing with the witness. This is not voir dire.

THE COURT: You should have responded sooner.

Let me hear the next question.

Restrict it to voir dire. If it is cross examination you may object.

Q Do you know what happened to the materials that were referred to in this letter?

A No, I don't. My interpretation of the preliminary material would be a draft of the notice of special meeting of shareholders or a printer's proof. As I said before, I have a copy of the final printed notice. I cannot tell you where the various proofs or drafts would be. They might be in teh hands of our then current counsel.

Q You have a file?

A I have a file on that meeting which I believe contains the final notice of meeting.

MR. FREDERICKS: I have no further questions, your Honor.

THE COURT: Is there an objection to the offer?

MR. FREDERICKS: No, your Honor.

pgbr 6 Asch-direct

THE COURT: NN will be received.

(Defendants' Exhibit NN was received in evidence.)

(Defendants' Exhibit PP was marked for identification.)

BY MR. MC KAY:

Q Did there come a time when you made additional comments or sent additional comments to the SEC?

A Yes.

Q I show you what has been marked for identification as Defendants' Exhibit PP. Can you identify that?

A This is a letter to the Securities and Exchange Commission dated November 11, 1969 which bears my signature on behalf of Diners' Club.

Q Did you send that letter on or about the date it bears?

A Yes, sir.

MR FREDERICKS: May I examine?

THE COURT: Yes.

VOIR DIRE EXAMINATION

BY MR. FREDERICKS:

Q Mr. Asch, who prepared what has been offered as PP in evidence?

A The information in this letter was prepared by

our treasurer's department which at that time involved Mr. Matthew Gallagher and Mr. Seymour Flug and my recollection is that they were assisted in this by Touche Ross & Company which were then our auditors and that would have been Mr. Philip Cohen who was a partner in that firm.

Q Mr. Asch, would you look at the second line in this letter. That refers to comments about proxy materials in connection with proxy materials submitted on October 20; is that correct?

A It goes on to say they also refer to comments relative to the letter of November 5th.

Q I understand that. But this letter also refers to proxy material submitted?

A That is correct.

Q So this letter of comment related not only to the S-1 but to the proxy materials?

A Yes.

Q I ask you, do you have any materials on this, any papers, documents, in connection with this proxy material?

A I repeat my answer to the earlier question.

MR. MC KAY: This is beyond voir dire, your Honor.

THE COURT: Overruled.

A I have a copy of the final notice of special meet-

ing of shareholders. I do not know whether my files contain any printers proof or earlier materials. I would have to examine my file.

Q Were you requested to examine your file on that matter before you appeared to testify in these proceedings?

A I was not.

MR.FREDERICKS: Thank you.

I have no objection to the introduction of the document.

THE COURT: PP will be received in evidence.

(Defendants' Exhibit PP was received in evidence.)

BY MR. MC KAY:

Q What became of the Diners/Fugazy operations with Diners'?

A They were alternately discontinued.

Q Had the Diners/Fugazy operation been profitiable or had it been a loss to Diners'?

MR. FREDERICKS: Objection, your Honor.

THE COURT: Sustained.

Q Can you tell us why they were discontinued?

MR. FREDERICKS: Objection.

THE COURT: I will allow that.

A They were discontinued because they resulted in

very large losses.

Q Can you tell us approximately how large?

A To the best of my recollection, the aggregate lost between the fiscal year ended May 31, 1968 and the end of the calendar year December 31, 1972 was in the area of $30 millions.

Q What became of the franchise program?

A The franchise program -- sales of franchises were suspended, I believe, in April of 1970 and Diners' Club, through other officers, negotiated the termination of certain franchise agreements in the subsequent periods.

MR. MC KAY: I have no further questions of this witness.

THE COURT: We will take a ten-minute recess, ladies and gentlemen. Don't discuss this case among yourselves. Keep your mind on all facets of the case until it has been concluded. When we resume I expect we will be going to approximately a quarter to one.

(Short recess.)

(Jury in box.)

CROSS EXAMINATION

BY MR. FREDERICKS:

Q You have been employed by Diners' Club since January of 1955, is that correct?

* * * * *

Q The date this was filed? Is that correct?

A That is right.

Q Tell me, sir, what was your capacity and duty with Diners' Club in the first part of 1968, starting with January?

A I was executive vice president of finance.

Q Were you engaged in any particular projects that you can recall?

A I was engaged in financing for the company, I was engaged in various analyses, and various projects. I can't remember the exact projects.

Q Was Diners' Club attempting to get financing in January of '68?

A No, we had our bank loans and we also sold some debentures to Continental at about that time. I don't have the exact dates.

Q Tell me, Mr. Asch, do you have any role to play in connection with the preparation of the Diners' Club and the financial statement and report to stockholders?

A You mean annual report to stockholders?

Q Yes.

A Yes, my role was to draft the narrative part of the report, that is, the chairman's letter to share-

holders.

Q How long does that usually take?

A It's very hard to say. It's quite a difficult job. It takes a considerable period of time.

Q When do you usually start that job, sir?

A Well, I would guess roughly about a month before the actual issuance of the report itself.

Q I'm sorry. You said about a month, sir?

A I would say roughly a month before the fiscal issuance of the annual report itself.

Q Can you look at Exhibit 31 and tell me when you started that?

A I see from this exhibit that the chairman's letter is dated June 16, 1969. I cannot tell you exactly when I started the preparation of this material.

Q Was that an unusually difficult letter for you to prepare?

A Yes.

MR. McKAY: Yes?

THE COURT: He said it was an unusually difficult letter for him to prepare.

Q When did you start working on it?

A I can't remember exactly.

Q Was there any other document sent to share-

holders of Diners' Club around this period of time?

A Yes, the notice of annual meeting of shareholders.

Q What is your function in connection with that, sir?

A I have very little to do with that. That is prepared largely by counsel.

Q What did you do in connection with this S-1, Exhibit 30?

A I was responsible for the history of the business and the description of the business.

Q You noted on direct examination that the index showed 21 items? Is that correct?

A I believe so.

Q Doesn't it also show a lot of items are not applicable to this S-1 statement?

A I will have to look at it, sir.

Q Look at items 3 and 4. Do you see the words "Not Applicable"?

A What about it?

Q Do you see the words "Not Applicable"?

A Yes, I see it.

Q What is it? Item 12?

A Yes.

Q And are other additional "Not Applicables" later on?

A That is correct.

Q Now, when did you begin working on this, your end of the proxy statement?

A Well, the filing was made August 28th. I am not sure the exact date, but I would guess that I must have started working on it before the beginning of August.

Q Before the beginning of August?

A Yes, sometime in July.

Q Did it take you very long to do?

A Yes, it was a tough job.

Q How long did it take?

A I can't recall the exact number of hours. It also required getting a lot of information together from other operations, credit card operations, et cetera.

Q Can you tell me approximately how long it took?

A I can't tell you exactly. I would say it probably took me not less than three weeks from beginning to end.

Q Now, you were working on on a proxy statement which was filed in October, were you not?

A I did not work on the proxy statement. That

was largely handled by counsel.

Q What was that proxy?

A There were several items involved. One was to ask the stockholder ratification to the sale of Reservations World project and there was another proposal to authorize the issuance of additional preferred shares.

Q More Continental debentures?

A I don't think the Continental debentures were involved insofar as asking stockholder approval was concerned. Stockholder approval was confined, as I recall it, to the issuance of additional preferred stock.

Q To whom?

A Goldman, Sachs had been making efforts to sell that preferred stock and Continental, I believe, indicated an interest in purchasing 54 per cent of the issue. I think there was $10 million involved in this preferred stock.

Q And your comment letters to the Securities and Exchange Commission which had been introduced on direct examination, your comments in respect to their deficiency letters related both to the proxy material and the registration statement?

A The letters did mention the words "Proxy Materials," yes.

Q You testified on direct examination that a registration statement has to be filed in accordance with the rules and regulations of the Securities and Exchange Commission? Is that correct?

A Yes.

Q And the Securities and Exchange Commission promulgates definite rules which must be followed at the time you filed a registration statement?

A I would say so.

Q And if you don't follow those rules the Securities and Exchange Commission sends back a deficiency letter for which the corporation is asked to comment? Is that correct?

A Not necessarily.

MR. McKAY: Objection.

THE COURT: I will let it stand.

Q Now, you testified that the registration statement was broken up into three basic parts, one dealing with business description, which was your function?

A Yes.

Q And then the financial statements?

A Yes.

Q And the legal opinions?

A Well, legal opinions and various other matters

not encompassed by the first two categories.

Q Does an annual report to shareholders, such as Exhibit 31, require legal opinions?

A Yes.

Q And financial statements?

A For a limited period, yes.

Q For what limited period?

A Usually it is required to show the statement for the latest years compared with prior years.

Q Well, Exhibit 31 had financial statements, didn't it?

A For the latest two years, yes.

Q It showed the financial condition of the company as of March 31, 1969?

A It did.

Q And the registration statement, the S-1, filed covered the same period?

A Yes, but I believe it included additional financial information which is not included in the annual report.

Q Additional information is required in the S-1 that was not required in the annual report?

A I could not give you the details, but I believe the additional information is required in the SEC regula-

tions, supplementary financial information.

Q Do you know whether or not these financial reports were available in the March 31, 1969 annual audit?

A The letter to stockholders is dated June 16, 1969, and I would conclude that the statement itself was physically mailed shortly thereafter, the proxy statement.

Q Let me show you Exhibit 13. What is that?

A That is a notice of annual meeting of shareholders dated June 20, 1969.

Q And that was filed and sent out at the same time that the annual report or proxy statement was sent out?

A Distributed to shareholders in the same envelope.

Q That is Exhibit 31?

A Yes.

Q And it had financial figures in it, didn't it?

A This has financial figures.

Q But that relied on the financial figures that were in here?

MR. McKAY: Objection.

THE COURT: Sustained as to form.

Q Mr. Asch, the materials that are contained in Exhibit 13, did you use any of those materials in prepara-

tion of your part of the S-1?

A I do not believe so, because the materials in this Exhibit 13 bear very little relation to the description of the business and my part in the S-1 was to prepare the description of the business.

Q Didn't you also tell us it dealt with other ownership of shares and interest in the company?

A You asked me about my part, sir. I did not prepare the part of the S-1 which dealt with ownership of shares.

Q I am sorry, Mr. Asch. I apologize. S-1 does not contain a description of ownership?

A Oh, yes.

Q And that information is in Exhibit 13, isn't it?

A Yes, it is.

Q Now, Mr. Asch, you testified that Fugazy Travel was losing money, Diners'/Fugazy Travel?

A I think I testified that it did lose a great deal of money.

Q And that you terminated the operation in 1971? Is that correct?

A That is the best of my recollection.

Q When in 1971?

A I believe that the sales of franchises was suspended in April 1970, and I believe that that reference is made in the annual report to shareholders for the year ended December 31, 1971.

pgbr 9

AFTERNOON SESSION

2:00 p.m.

(In open court; jury present.)

THE COURT: You may proceed, Mr. Santora.

MR. SANTORA: The defendants call as their next witness Mr. Harold Johnson.

H A R O L D E. J O H N S O N, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

THE COURT: You may proceed.

DIRECT EXAMINATION

BY MR. SANTORA:

Q Where do you reside?

A In Port Washington, Long Island, New York.

Q What is your occupation?

A I am the executive vice president in charge of investments and finance for the Continental Corporation.

Q Basically what are your duties and responsibilities in that position?

A To supervise, review, and make recommendations to the Executive Committee and Board, through the Chairman of the Board, for the investment of firms and the financial operation of the Continental Corporation and most

pgbr 10 Johnson-direct

of its subsidiaries.

Q Can you tell us how long you have had those responsibilities, those areas of responsibilities at Continental Corporation or Continental Insurance?

A Since approximately 1962.

Q State your background, Mr. Johnson, for the Court's benefit and the jury's benefit.

A I graduated from the University of Utah in 1940. I came to New York to go go school and joined the investment banking firm of Clark, Dodge & Company.

In 1942 I joined the Naval Reserve and the Navy during the war for four years, ending in 1946 as lieutenant in the Naval Reserve.

In 1946 I joined the Continental Insurance Company as an investment analyst in their investment department.

I proceeded through various assignments in the investment department. I think I first became an officer in about 1955.

I completed my work at New York University for my master's degree in corporation finance and investments and, as I have previously stated, I have been in charge of the investment portfolio since about 1962.

My other activities, I am a trustee of the Queens

pgbr 11 Johnson-direct

County Savings Bank; I am a director now of the Continental Corporation, of course; I served for two years as a trustee of the Village of Monsey Park in Long Island and four years as Mayor.

I have served in various local charities efforts and hospital efforts.

That covers it as much as I can.

Q In 1968 did you have any position at the Diners' Club?

A I was a director in Diners' Club.

THE COURT: As well as being the executive vice president of investments and finance for Continental Insurance Company first and then for Continental Corporation?

A Yes, sir.

Q Tell us briefly what your duties and areas of responsibility as a director of Diners' Club in 1968?

A Essentially to attend board meetings and review the operation as they were reported to the board of directors by the then chairman.

Q In 1968, do you know whether or not Continental held or owned any common stock in any public companies?

MR. FREDERICKS: Objection. Leading his witness, your Honor.

THE COURT: I suppose so. Yes.

* * * * *

kept coming up. If a discussion was in a broad sense limited, yes, there were discussions, but it seemed to die down after this day.

Q Well, can you recall any specific discussions you had, sir, following November 11, 1968?

A No, I can't recall any specific ones.

(Defendants' Euhibit SS marked for identification.)

Q Mr. Johnson, I show you Defendants' Exhibit SS and I ask you if you recall receiving a copy of that document on or about the date that it bears?

A Yes, I recall receiving this letter.

Q Do you recall having any discussion about this letter with anyone whose name appears on that document?

A I believe I recollect that the individual mentioned in the letter, Dr. Pearlman, called me on the phone relative to this subject matter.

Q Tell us if you can the circumstances under which that letter was received by you.

A Mr. William Fugazy wrote this letter to me to ask me, to tell me, I should say, that Dr. Leo Pearlman, who was president of Industrial Holding Corporation, was going to contact Continental, and inasmuch as it is addressed to me, he was going to contact me, and he did, and we had

a telephone conversation.

Q When you spoke to Mr. Fugazy, did he tell you what the subject matter was of the proposed contact by Dr. Pearlman?

A Yes, I think that Dr. Pearlman, Mr. Fugazy had told me, had indicated an interest in purchasing or acquiring Diners' Club, and this was the subject matter that he wanted me to discuss or suggest I listen to Dr. Pearlman about.

Q What, if anything, did you do after you received this letter from Mr. Fugazy?

A To the best of my recollection, I think Dr. Pearlman called me and we had a brief conversation, but I don't think that anything came of it after that. I don't believe that he ever appeared in my office. We didn't set up an appointment.

But other than the telephone conversation, I know of no further aspirations or activities with respect to Dr. Pearlman and Diners' Club.

Q Do you have any specific recollection, sir, about your conversation with Dr. Pearlman and, if so, tell us what you recall?

A I don't recall any specific conversation with Dr. Pearlman.

MR. SANTORA: Your Honor, I would like to offer Exhibit SS in evidence.

MR. FREDERICKS: No objection.

(Defendants' Exhibit SS received in evidence.)

MR. SANTORA: I would like to read Exhibit SS to the jury.

THE COURT: You may.

(Mr. Santora reads from Defendants' Exhibit SS to the jury.)

Q Now, following the date which appears on Exhibit SS, Mr. Johnson, which is December 23, 1968, did you have any further conversations with Mr. Fugazy about your talks with Dr. Pearlman?

A Not to my recollection, no.

Q Now, subsequent to December 23, 1968, did you have any conversations with Mr. Marx?

A Yes.

Q Can you recall when those conversations took place?

A I believe shortly thereafter, in the beginning of 1969. I had conversation with Mr. Marx relative to a party that had indicated an interest through him or through one of his associates, that wanted to talk about acquiring Diners' Club from Continental.

The specific dates I can't remember, but I remember the company and I remember Mr. Marx was the one that set up the meeting.

Q Do you recall anything that Mr. Marx said to you on that day?

A No, I can't remember the conversation, except that he was interested in having me meet the people from this company to explore the acquisition by that company of Diners' Club.

Q Following that conversation, Mr. Johnson, did you have any further discussions with Mr. Marx about that subject?

A Well, he did set up the meeting and we did meet and we did discuss it and had that initial conversation. I had informed Mr. Herd of it. I was given permission to do so, and after we had the meeting with them, why, we said, "How do you do," and I received a nice courteous letter from the people that indicated they had no interest in it.

Q Did you have any discussions with Mr. Marx in 1968 or 1969 concerning the shares of Diners' Club stock that he was holding?

MR. FREDERICKS: Objection, your Honor.

THE COURT: Yes, you are leading.

Q Was there any other conversation that you had in '68 and '69 with Mr. Marx, the specific subject of which you can recall today, Mr. Johnson?

A I had a meeting with Mr. Marx sometime the early part of 1969 where he offered to sell to Continental certain of his shares, and when I say, "offered," he asked me if we were interested in buying.

Q Do you recall how many shares were involved?

A I can't say the specific number, but it was a substantial number. It was not a minor transaction.

Q Do you recall what, if anything, you said to him at that time?

A I told him I would mention this to Mr. Herd and I would give him an answer.

Q Did you mention it to Mr. Herd?

A Yes, I told Mr. Herd about it and Mr. Herd said that we didn't have any interest in acquiring additional shares of public stockholders, if you will, other than the general stockholders, because we were having trouble financing Diners' at this time, and so I told Mr. Marx that we had no interest in buying the stock.

Q Do you recall what, if anything, Mr. Marx replied to you when you told him that?

A No, I don't recall a specific comment he made.

This was relayed in a conversation or a meeting.

Q Mr. Johnson, did there come a time when Continental made a tender offer to Diners' Club?

MR. FREDERICKS: Objection.

THE COURT: Sustained. You are leading.

Q Can you tell us, Mr. Johnson, what, if anything, happened in 1969 or 1970 in connection with the Diners' shares that were held by Continental and the remaining outstanding Diners' Club stock?

MR. FREDERICKS: Objection.

THE COURT: Overruled.

A Through 1969 the troubles of Diners' Club became more evident and--

MR. FREDERICKS: I am going to interrupt the witness.

THE COURT: It does not appear responsive. Let us have the question.

(Question read.)

A Continental made a tender offer for the Diners' Club shares, the remaining outstanding shares of Diners' Club.

THE COURT: When?

THE WITNESS: This was, I think, about June of 1969, to the best of my recollection.

Q Do you recall the reason for the tender offer?

A I recall it very well. The banks, because of the problems, the financial problems with Diners', became very restless and wanted additional indication of our investment in Diners' Club to support their bank loans which they had out.

One of the ways that this could be accomplished was for Continental to take a larger equity position in Diners' Club, which we did.

Q Mr. Johnson, I show you Plaintiffs' Exhibit 26. I ask you if that is the tender offer which you were alluding to a few moments ago?

A Yes, this is the tender offer.

THE COURT: It is in evidence. What is the date of the tender offer?

MR. SANTORA: You are asking the witness, your Honor?

THE COURT: Yes.

THE WITNESS: This is February 6, 1970.

THE COURT: I believe you said a few minutes ago that your recollection was that Continental made a tender offer in, I thought you said, June of 1969.

Were there two tender offers or were you mistaken when you said that?

THE WITNESS: No, my dates are mistaken. I would have to go with the tender offer as published there. The problems were building up at this time and I lost track of what the exact date was.

Q So now after looking at Plaintiffs' Exhibit 26 your recollection is refreshed and you recall the tender offer as having been made in February of 1970?

A Yes,sir.

MR. SANTORA: We have no further questions, your Honor.

THE COURT: You may inquire.

MR. FREDERICKS: May I have this marked for identification.

(Plaintiffs' Exhibit 50 marked for identification.)

CROSS EXAMINATION

BY MR. FREDERICKS:

Q Mr. Johnson, can you tell me who David J. Mahoney, please?

A David J. Mahoney, I believe, is the chairman of Norton Simon at the present time.

Q Did David J. Mahoney in November, 1969 have any position either with Continental or with Diners' Club?

A I believe that he was a director of Diners'

(Recess.)

(Jury enters the courtroom.)

MR. SANTORA: The next witness is Mr. J. Victor Herd.

V I C T O R H E R D, called as a witness by the defendants, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SANTORA:

Q Mr. Herd, where do you reside?

A Brooklyn, New York, 2 Montague Terrace.

Q What is your present occupation?

A Retired..

Q What was the occupation from which you retired?

A Chairman of the boards of the Continental Insurance Companies and the Continental Corporation.

Q When was it that you retired, sir?

A As chairman in March of 1970; as chairman of the Financial Committee a year later.

Q Would you please state your background for the Court and the jury?

A My background careerwise is essentially insurance, underwriting, having started in April of 1917 and joined up with the Continental Insurance Companies in May of 1920.

pgbr 8 Herd-direct

With the exception of 12 years with a company in Philadelphia in reorganization from 1930 to 1942 my whole career has been spent with the Continental.

Q What was the position you occupied at Continental in 1968?

A I was chairman of the board of the Continental Corporation and most of the Continental subsidiary companies.

Q Can you tell us generally what were your areas of responsiblity in that position, sir?

A Well, in general terms, the chairman had the ultimate responsiblity for the selection of the senior officers, and company policies and the major changes which were taking place, at least from 1957 when I became chairman until I relinquished the chairmanship at three years over age.

Q Tell us, Mr. Herd, what other companies, if any, you were either an officer or director of in 1968?

A The American Telephone and Telegraph Company; I was a member of the executive in finance and compensation committees there. Union Carbide Corporation, member of the executive committee

The IBM World Trade Corporation, the same. Brooklyn Union Gas Company, a member of the board and executive committees. Of course the Phoenix Assurance Company of England, a meber of the board, executive

committee, and the chairman's committee. I later became a director of Tishman Realty, which I am today. And AT&T, the Union Carbide, and the Continental boards which I relinquished, the last one last month.

Q In 1968, Mr. Herd, did you attend meetings of the boards of directors of these various corporations on which you were a director?

A The Diners' Club should have been mentioned as oneof the boards that I was on.

At the beginning my attendance there was not 100 per cent because Mr. Johnson was keeping a watching eye on our investment there and it was not until the developments seemed to warrant personal undivided attention and attendance that I began to appear there regularly.

THE COURT: Mr. Johnson was also a member of the bord of Diners' Club as I recall.

A Yes, your Honor.

Q I show you a document entitled RR which bears the date of April 11, 1968. I ask you if you are familiar with the document of which that is a copy?

A I am.

Q By the way, do you see the signature there?

A Yes.

Q Is that your signature?

* * * * *

of business. You have indicated, I believe, that there were several facets to the Fugazy business in 1967. Do you recall from which facet of the business the company derived the greatest income or revenue?

THE WITNESS: No, sir, I do not.

BY MR. McKAY:

Q Do you know what facet of the business consumed the most time as far as the personnel were concerned, if you know?

A I don't specifically know.

THE COURT: Would you describe the franchise program as it existed in 1967?

THE WITNESS: Yes, sir.

The main thrust of the company's marketing effort was being made through a franchise program. The management of the company had concluded that in order to have a viable marketing arm it would engage outside people in the marketing effort. These outside people would have a financial interest in the operations of an office. They operated these offices under the aegis of Fugazy Travel Bureau.

B2 Q Do you know how long before you joined Fugazy Travel Bureau that it had established its franchise program?

A I do not.

* * * * *

revenue from the initial franchisees than it got from these other payments or vice versa?

A I don't recall specifically. In order to answer your question I would have to have an awareness that I don't now have of the exact numbers that came from each individual source. I could make a presumption, but I am not able to recall.

THE COURT: Did you keep a record of payments made by different franchisees and, if so, would you describe the records which you kept? Some sort of cash receipt book or other records?

A We had the ordinary books of entry any company would maintain. We would have cash receipt books and in those respective books we would indicate that source of receipt from the franchisee, whether it would be the franchise fee, payment for advertising, cooperative advertising, royalties, or whatever.

Q In return for these payments by the franchisees to Fugazy Travel Bureau, what was the franchisee supposed to be getting in return?

A Let me try and recreate the whole program.

The initial franchise fee of $20,000, $10,000 of that was returned to the franchisee upon the opening of an accepted office. That was to provide initial working

capital for that office. The offices operated under the aegis of the Fugazy name. I am not an expert in regulatory authorities with respect to the International Air Travel Association or the Air Travel Conference, but at that time, as I recall, the franchisee could not operate in a doing-business style as Fugazy unless he was actually part of the Fugazy umbrella.

What did he get?

He joined with us in the development of a marketing concept and he shared with us the fruits of that development.

Q Were there any fruits to be shared?

MR. FREDERICKS: Your Honor, I have to object to that question.

THE COURT: Yes. I think that the form is improper.

If you want to inquire about the franchisees and whether the witness knows if they made money or did not make money, you may inquire properly.

BY MR. McKAY:

Q How was this initial franchise fee payment booked by the Fugazy Travel Bureau?

A It was recorded when received.

Q In what amount?

A Fugazy Travel Bureau..

Q Now, when the assets of Fugazy Travel Bureau were acquired by the Diners' Club, was this franchise program part of the assets acquired?

A Let me respond in this way: The Diners' Club after the acquisition continued the franchise program.

Q In the same manner as you have just described?

MR. FREDERICKS: Objection, your Honor.

THE COURT: Overruled.

A Basically it didn't change.

Q And then Diners' set up a wholly owned subsidiary, Diners/Fugazy to operate it.

MR.FREDERICKS: I object.

THE COURT: I know he is leading, but I will let him.

MR.FREDERICKS: It is a statement. It is not even a question.

THE COURT: I will put a question mark at the end of it. It is a question. Can you answer it?

THE WITNESS: The result and the entity from the sale ended up something called Diners/Fugazy. The initial entity as I previously testified was exactly the same name as the prior entity except it was incorporated from a different state.

Q Just so we have the terms straight, Mr. Phillips, the term franchisor can be used to describe Fugazy Travel Bureau when selling franchises.

MR. FREDERICKS: I am going to object to the question.

THE COURT: You had a franchise program. Before the acquisition by Diners' Club who was the franchisor and who was the franchisee?

THE WITNESS: Fugazy Travel was the franchisor and whoever ultimately came to operate a particular location was the franchisee.

THE COURT: After the Diners' acquisition who was the franchisor and who was the franchisee?

THE WITNESS: Much the same, except there were a series of names. I will go through it for the edification of perhaps myself. Because of the conference, appointments within the name of Fugazy Travel Bureau, it was determined by the Diners' Club that it would create an entity, Fugazy Travel Bureau, Inc., organized in a different state. Therefore, it facilitated for a point of time the transfer of appointments. Subsequently, that entity became Diners/Fugazy something or other. In each of these cases this entity, whatever it was called, was the franchisor in much the same manner as the old Fugazy Travel Bureau had

been. That old Fugazy Travel Bureau then became known as F.T. Ventures just to get rid of conflictof name.

THE COURT: Did F.T. Ventures continue to serve as franchisor after it was formed?

THE WITNESS: No, sir. Any right,title, and interest in the franchise program, which become F.T. Ventures, was sold to the Diners' Club. F.T. Ventures then did nothing except wind itself down.

Q What kind of expenses did Fugazy Travel Bureau incur in administering the franchise program?

MR. FREDERICKS: Objection, your Honor.

THE COURT: It is a rather open-ended question. I think if you can refine it down to component parts I will permit it to be asked, not in the rather broad form you have it now. It is not clear as to date. It is not clear in other respects.

Q In '67, were there certain expenses directly attributable to the administration of the franchise program?

A Yes. We had franchise salesmen, we had franchise administration people. So we had people costs, and the attendant related expenses to people costs -- telephone, a piece of the rent, travel and entertainment, if any.

Q As the size of the franchise program increased in '67, did these expenses increase as well?

* * * * *

THE COURT: Overruled.

MR. FREDERICKS: I will withdraw that.

A My recollection is approximately $2 million.

Let me clarify that. That took the form of direct investment and guaranteed bank debt.

Q Did Mr. Marx ever tell you that he regretted having gotten involved in the Fugazy Travel Bureau?

A No, but Mr. Marx did tell me he didn't want to put any more money into it.

Q Did he ever tell you that he wanted to extricate himself from Fugazy Travel Bureau?

MR. FREDERICKS: I will object on that. This is clearly leading his witness. I don't think it is proper under the rules. I have checked the legislative history on that rule, and I don't think this is proper, to lead this witness at this time.

THE COURT: I am going to allow the question.

Do you have the question in mind?

THE WITNESS: I would like to have it repeated.

(Record read.)

A I don't recall. He indicated to me he didn't want to put any more money into it.

I guess I concluded from that--

THE COURT: Not what you concluded.

In other words, his statements to you were along the line: I don't want to put any more money into this operation, or whatever?

THE WITNESS: I believe so.

Q When did Mr. Marx tell you that?

A I think soon after I joined the company.

Q These franchisees were to operate, essentially, the same kind of travel business as the Fugazy Travel wholly-owned offices had been operating?

MR. FREDERICKS: I will object to that question.

THE COURT: Sustained.

Q Did the business of the franchisees differ in any way from the Fugazy Travel Bureau wholly-owned travel offices?

A Not that I can recall.

Q Between 1963 and 1967, did Mr. Marx ever tell you that he had put additional moneys into Fugazy Travel Bureau?

MR. FREDERICKS: May I get the period of time again?

THE COURT: I think the question is objectionable as to form.

MR. McKAY: I will rephrase the question.

THE COURT: You may.

* * * * *

A Yes.

Q What is the date of that document?

A August 22, 1967.

Q Does that refresh your recollection as to when the 1966 Fugazy Travel Bureau financials were delivered to Diners'?

A It certainly does. August 22, 1967.

Q Can you tell us when the Fugazy Travel Bureau financials were normally completed at the end of a period, Mr. Phillips?

MR. FREDERICKS: Objection to the form of the question, your Honor.

THE COURT: Sustained as to form only.

In 1967, how frequently were financials prepared by Fugazy Travel? Monthly? Quarterly? Semi-annually? Annually? Some other time?

THE WITNESS: I don't not recall, your Honor.

Q The 1966 financials, were they for the year ended September 30, 1966?

A Is that what the letter says there?

Q Yes.

A Then they were, yes.

Q Do you know, generally, how long it took to prepare year end financials for Fugazy Travel Bureau?

* * * * *

A Well, no, because my talks at Diners' Club didn't start until after this was completed.

Q Well, do you recall yourself and Mr. Fugazy talking about June 21st as the first date that you spoke to Mr. Liftig or somebody about a possible agreement with Diners' Club?

A That is right, and this was signed the 21st of June--I mean the 19th of June.

Q Now, let's look at Exhibit YY, which was signed on the 22nd of June.

A Yes, my discussions with Mr. Liftig, I recall I testified, were very, very preliminary discussions where they approached us about the possible sale of Travelco to Diners', and he was simply a business broker who met with Mr. Fugazy and then met with me.

Q Look at the last page, the verification page on Exhibit YY.

A The last page?

Q Yes.

A Yes?

Q Do you see the notarization of your signature by Mr. Adler?

MR. FREDERICKS: Your Honor, I would like to know which page we are talking about.

* * * * *

A Certainly.

Q In New York?

A In New York.

Q Do you know if Mr. Fugazy spoke to Mr. Fruchtman when you were not present?

A Yes, he did.

Q Prior to that arrangement, had Mr. Fruchtman ever been in the travel business, to your knowledge?

A Not to my knowledge.

Q Where did Mr. Fruchtman live in 1967?

A He lived in Ohio.

Q Toledo, Ohio?

A Yes, Toledo.

Q Do you know why Mr. Fruchtman was interested in going into the travel business? Did he ever tell you?

A No, he never did tell me.

Q Do you know why to this day, sir?

A I understood that he wanted to get into the travel business because he thought it had great potential and it also has certain advantages .

Q Did you ever ask Mr. Fugazy's opinion about Mr. Fruchtman's qualifications or credentials to run a travel office?

A I discussed it with Mr. Fugazy.

A No, I don't.

Q There is mention in Exhibit YY of a note of $175,000. Do you see that in Exhibit YY?

A Yes.

Q Was that note carried as a note receivable by Fugazy Travel at the time of the Diners' acquisition?

A I don't recall.

Q Do you know whether Diners' paid for that note receivable?

A No, I don't.

Q Please turn to paragraph 4.6. Do you recall any discussion with Diners' Club about the matters covered in 4.6 of Exhibit 5?

A I don't recall any specific discussions. Obviously there were.

Q Did anybody at Diners' Club tell you they wanted to make certain you and the Messrs. Fugazy had no interest in the Travelco office?

A Yes. I did hear that.

Q Did they tell you what the reason was?

A Yes, they did.

Q What was the reason given to you?

A Mr. Bloomingdale told me that he felt -- and I agreed with it -- that there should be no conflicts of interest and that Diners' Club should own the entire Fugazy Travel complex.

Q Did they, in fact, tell you at Diners' Club that they were not going to make that deal unless they got this representation from you and Messrs. Fugazy?

A No, they didn't. Everybody agreed on that in principle.

(Defendants' Exhibit EEE marked for identification.)

Q I show you Exhibit EEE and I ask you if that's your signature.

A That is my signature.

MR. SANTORA: I offer this document into evidence.

MR. FREDERICKS: No objection.

THE COURT: It will be received.

(Defendants' Exhibit EEE received in evidence.)

Q On October 30, 1967, did you have any direct or indirect interest in the office of Travelco, New York?

A I didn't think I had but this document makes me wonder.

Q Do you recall any interest that you had in the Travelco office?

A No, I don't.

(Pause.)

MR. FREDERICKS: While they are marking exhibits,

may I ask that this document be substituted for the one that has been marked in evidence. This appears to be the original that was marked in the Phillips' examination.

I would point out to your Honor, that there is a difference in the size holes, the second page and the third page. Look at the difference in the punch marks, one, two, and three.

THE COURT: It is not a very good Xerox.

MR. FREDERICKS: That's why I want this in evidence.

THE COURT: I will permit that.

Where is Exhibit YY?

MR. SANTORA: Here it is, your Honor.

THE COURT: With counsel's permission I will substitute the copy of this document which was marked originally at Mr. Phillips'deposition, which contains the original marking.

MR. SANTORA: Whose file did that come from?

MR. FREDERICKS: From yours.

MR. SANTORA: Where did it come from just now? May I see it briefly?

THE COURT: You may look at it.

MR. SANTORA: I don't have the time to read this. May I attach it to the exhibit?

THE COURT: No. Read it now.

(Pause.)

MR. SANTORA: All right, your Honor.

THE COURT: I looked at it already. I would not have suggested a substitution if I thought there was a difference between them.

We are substituting exhibits, ladies and gentlemen.

Let's move along, counsel.

(Defendants' Exhibits FFF, GGG, and HHH marked for identification.)

BY MR. SANTORA:

Q I ask you to look at Defendants' Exhibits FFF, GGG and HHH. I ask you, sir, with respect to Exhibits GGG and HHH if your signatures appear there?

A Yes, they do.

Q And with respect to FFF, have you ever seen a copy of that agreement before?

A I don't recall.

Q I ask you to look at paragraph 3 of Exhibit FFF. I ask you if you have any recollection of a loan from the Franklin--

MR. FREDERICKS: I object, your Honor. The document has not been offered in evidence. To ask him if

he has any recollection relating to contents, I think that is improper.

THE COURT: Yes. The form is not proper.

Whether or not he ever saw the document before, it may be used to refresh his recollection, but the form as it is starting out is, in the Court's judgement, improper.

Q Does paragraph 3 refresh your recollection as to what sum of money was involved in the transaction involving the sale of the office to Travelco?

A No, it does not.

Q Does the date appearing in paragraph 3 refresh your recollection in any way as to when Fugazy Travel was paid?

A No, it does not.

Q Please look at Exhibit GGG. I believe you said that is your signature. I ask you if you had any discussion, if you can recall any discussion, with Mr. Fugazy on or about October 13, 1967 concerning this document?

A I don't recall it, but I probably did have discussions with him.

MR. SANTORA: Your Honor, I offer Exhibit GGG in evidence.

THE COURT: Is there any objection?

MR. FREDERICKS: I just received the document. I have not had an opportunity to review it.

THE COURT: Was this identified in the pre-trial order?

MR. SANTORA: Yes. It was examined on depositions.

THE COURT: I will wait.

(Pause.)

MR. FREDERICKS: Might I suggest if he gives me the other document I can go through them both at the same time.

THE COURT: I suggest you take this one which is five pages long and then turn to the next. He has not offered the other one yet.

MR. FREDERICKS: With Exhibit GGG I can suggest that paragraph 5--

THE COURT: I have read it, and I think that that's what you are offering. I read the others and I think that would be the thrust of it.

Counsel might direct his attention to that.

(Pause.)

MR. FREDERICKS: No objection, your Honor.

THE COURT: It will be received.

(Defendants' Exhibit GGG received in evidence.)

Q Do you see paragraph 5, sir?

THE COURT: The last page.

A Yes.

Q Do you recall having any discussions about the Fugazys having indemnified Mr. Fruchtman in connection with the sale of Travelco's office?

A Yes, I do.

Q Do you see in the top line of paragraph 5 there is a reference to an agreement?

A Yes.

Q Does that refresh your recollection as to whether you have seen Exhibit FFF, sir?

A No. I don't think I have ever seen it.

Q When is the first time you discussed with Mr. Fugazy that they had indemnified Mr. Fruchtman in connection with that sale?

MR. FREDERICKS: Objection to the form of the question.

THE COURT: Sustained.

Did there come a time--

MR. SANTORA: I thought he had already said that.

THE COURT: I don't think so.

Q Did you have a discussion with Mr. Fugazy about

his and his brother's indemnity agreement with Mr. Fruchtman concerning Travelco?

A Yes.

Q Do you recall when that was?

A Slightly before the agreements were signed.

Q Which agreements?

A The agreements for the option.

Q You are talking about the June agreements?

A Yes.

Q And Mr. Fugazy, did he tell you why he was indemnifying Mr. Fruchtman?

A Yes.

Q Why was that?

A Because Mr. Fruchtman requested it.

Q Did he tell you why Mr. Fruchtman requested it?

A Because Mr. Fruchtman felt that he knew very little about the travel business and he was buying into a business he knew nothing about, and that the Fugazys knew all about, so he requested he have some indemnification.

Q At all the times you were at Fugazy Travel had Fugazy Travel ever indemnified a purchaser of a Fugazy office before this occasion?

A Not that I can recollect.

MR. FREDERICKS: I object to the form of the

question, your Honor.

THE COURT: It has been answered. The jury heard it. I will let it stand. He said not that he recollects.

Q Did you have a discussion with Mr. Fugazy as to your and Mr. Summerlin's indemnifying the Fugazys?

A The time is a little vague.

Q Look at paragraph 5, towards the middle.

A Yes, I see that.

Q Mr. Marx, do you recall having any discussion with Mr. Fugazy about your indemnifying him for some indemnity he might have to give to Mr. Fruchtman?

A Yes.

Q Do you recall when that was that he first discussed it with you?

A I don't recall it, but I presume it was around the time this was signed.

Q Why did you give such an indemnity?

MR. FREDERICKS: Objection.

THE COURT: I will allow it. It is a very broad question. It calls for a broad answer.

A I gave the indemnity because I felt if the Fugazys were indemnifying him we should share half of the responsibility.

Q So the way this was set up, if Mr. Fruchtman lost money on the transaction of business of Travelco that money would be paid up by the Fugazys and then if the Fugazys had to make that payment they would get it indemnified from you and Mr. Summerlin; is that it?

MR. FREDERICKS: I object to the form of the question.

THE COURT: Sustained.

Would you describe what was to happen in the event that the Fugazys did, in fact, indemnify Mr. Fruchtman?

THE WITNESS: As I read this, your Honor, Mr. Fruchtman did not receive payment in full of the $100,000 from Travelco prior to the liquidation of the corporation--

MR. FREDERICKS: I object to the witness reading from a document that is not marked in evidence--unless it is. I don't think that document is, but let me know what document he is reading from.

THE WITNESS: GGG.

MR. FREDERICKS: Then I will withdraw my objection now that I know what the document is.

THE COURT: It is in evidence.

A In other words, if Mr. Fruchtman lost money and he did not get paid by Travelco, he would get paid 50 per cent by the Fugazys and 50 per cent by Marx & Company and John V. Summerlin.

Q Mr. Marx, did Mr. Fruchtman really buy the office of Travelco or did he put up some money so the Fugazys could buy the office from Travelco?

A He bought the office.

Q Did you disclose this indemnification agreement to Diners' Club in 1967, Mr. Marx?

A I don't recall discussing it with them.

Q Did you have any discussions with Mr. Fugazy as to where the money was going to come from to pay down the $150,000 to Mr. Fruchtman that is mentioned in this agreement, GGG?

MR. FREDERICKS: Objection, your Honor.

THE COURT: Sustained as to form.

Q You are on an indemnity on GGG and so are the Fugazys with respect to Mr. Fruchtman in the amount of $150,000. Did you have any discussions with Mr. Fugazy on or about October 13, 1967, as to where the money was coming from to pay back the $150,000 to Mr. Fruchtman?

MR. FREDERICKS: I object to the testimony of counsel and the form of the question.

THE COURT: Rephrase the question.

Q How was the $100,000 to be paid to Mr. Fruchtman?

MR. FREDERICKS: Objection.

THE COURT: Rephrase the question. In the event that Mr. Fruchtman sustained a loss up to $100,000, was he to be indemnified?

THE WITNESS: Yes, sir.

THE COURT: Will you describe the manner in which he was to be indemnified and by whom?

THE WITNESS: He would be indemnified for the entire $100,000 if the company, Travelco, had lost that much money, and 50 per cent of this, or $50,000, would be put up by William and Louis Fugazy, half each, 40 per cent would be put up by Marx & Company and 10 per cent by John V. Summerlin.

Q At the time the original agreement was signed on June 19th had there been any discussions to your knowledge about an indemnity to Mr. Fruchtman?

A Yes, there had been discussions.

Q Who had been discussing that?

A Mr. Fugazy.

Q With whom?

A With Mr. Fruchtman.

Q Do you know why the indemnity was not included in the June 19th agreement?

A No, I don't.

Q You have said what would happen if there were losses. Can you tell us what was going to happen if there had been profits?

A We had no liability.

Q The profits would be used to pay the $100,000 to Mr. Fruchtman?

A The profits would be the profits of the corporation.

Q Which is Travelco?

A Yes.

THE COURT: As I understand, in addition to the $75,000 cash payment Travelco would pay an additional $175,000 over a period of five years?

THE WITNESS: Correct.

THE COURT: And to whom would those payments be made?

THE WITNESS: As I recall it, Fugazy Travel Bureau.

Q If at any time in '67 or thereafter when the Fugazy Travel Bureau received any money from Mr. Fruchtman that would be in connection with the sale of Travelco,

* * * * *

A Yes, I do.

Q Do you recall having discussions with the person who signed that document prior to receiving a copy of that document, sir?

A Yes, I do.

Q Did you have any discussions about that document with Mr. Fugazy?

A I don't specifically recall it.

Q Do you recall discussing that document with anybody at Diners' Club in August of '67?

A Not this document, no.

Q Please look at Exhibit L for identification. Do you recall discussing that document with anybody at Diners' Club in 1967?

A I don't really.

MR. SANTORA: Your Honor, I offer Exhibits K and L previously marked for identification in evidence.

THE COURT: Let me hear you, Mr. Fredericks.

MR. FREDERICKS: May I approach the side bar? I don't think I would like to discuss this in the presence of the jury.

THE COURT: You objected?

MR. FREDERICKS: Yes.

THE COURT: All right, you may approach the

side bar.

(At the side bar.)

MR. FREDERICKS: I object to L very strenuously. I don't think K is relevant to the proceedings. I don't think there is a proper foundation. We briefed the matter and you heard me on K before and I am going to renew that objection.

As to L, I suggest your Honor there is clearly no relevance to L under any circumstances. Counsel has shown to this Court and marked in evidence a release, a dismissal and satisfaction of this Tower lawsuit in August of '67 before the Diners' deal was consummated. There is no question in my mind that had there been any relevancy of any kind, which I suggest there was not, the fact that this lawsuit was terminated in August of 1967 when the deal was not concluded until October, certainly, you cannot argue that one is obligated to disclose to Diners' the fact that Tower Corporation and Fugazy had a lawsuit which was settled before the deal was consummated.

THE COURT: I don't know also that the complaint for example, is verified by the witness, which might make a difference. I have in front of me an unverified complaint.

MR. SANTORA: That is the one I got from the

Court file. I can inquire about it.

When the matter was first presented to you, as I recall it, you indicated relevance, particularly in relation to Mr. Fugazy. The main reason for it not being received at that time was the allegation of surprise, and that has been cured and I thought there had been discussion in connection with the sale which started in June of '67, plus, as you know, we are arguing that the settlement itself at that time is a point that is part of our case.

MR. TOLAN: Your Honor, we briefed this whole matter, submitted briefs to the Court, as well as a bound volume of all of these documents. I think our position with respect to that is contained in there. It is highly prejudicial. It has nothing to do with this lawsuit, and relates to tangential issues and allegations and settlements of lawsuits.

We submit, your Honor, that for the reasons stated in our brief the objection should be sustained.

MR. FREDERICKS: Your Honor, it is page 411. May I also add that Rule 403 expressly provides that although relevant, evidence must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, and misleading the jury, or by consideration of undue delay, waste of

time or needless presentation of cumulative evidence.

I suggest, your Honor, that this is clearly a tangential issue. This matter was resolved before the agreement of October was signed. There is no question of a resolution of that. It has been produced by counsel in this courtroom. I think it gets us involved in an area which is beyond the consideration of the issues before this Court.

I submit it is prejudicial. And, beyond that, it is a matter not between the parties in this litigation in addition to everything else. I suggest that under all the tests that this document is totally improper.

MR. SANTORA: Your Honor, may I be heard at this point?

THE COURT: Yes.

MR. SANTORA: It is obvious that it is relevant, particularly as to Mr. Fugazy, and it has been said about Mr. Fugazy on one occasion by your Honor that Mr. Fugazy was in many ways the chief asset of the company and a man who was going to move into an administrative and executive post, giving him a considerable power over the operation of the company.

I just elicited from this witness that he did not discuss these matters with Diners' Club. It is directly

related to our counterclaim. I think counsel's argument goes to weight, but, certainly, the existence of this claim and assignment, the lawsuit from which it arose, the nature of that suit as set forth in the argument, is the highest degree of relevance.

I think the prejudice he talks about is inevitable from the relations between them. That has nothing to do with the relevance of it to the extent that this thing could possibly be prejudicial. It is only because of its relevance to what goes on in 1967.

MR. FREDERICKS: Mr. Santora says it is relevant. I don't know how a case that was settled in August and not involving the parties in this litigation can in any way be relevant to the agreements that were signed in October.

MR. SANTORA: In that connection, your Honor, and that brings us to Exhibit N, which is the affidavit I had offered before of Mr. Marx on this case and which your Honor did not receive on the plaintiffs' case, because, as your Honor recalls, there were statements in there about the need to settle the Tower case so he could sell it, this document even ties in with the other two, because that is exactly what they were saying.

He said there was a fraud arising from

negotiations with Fugazy. He came up to August '67. He settles it while he is negotiating with Diners' Club, and then takes an assignment of a claim against Fugazy, which he then offers to the man who is going to become president of the company, and the company does not even know about that. He did not know for three years he was sitting there with a claim against the man.

MR. TOLAN: Which claim?

THE COURT: It has been represented to the Court that the lawsuit set forth in the complaint marked Defendants' Exhibit L for identification, was settled and discontinued.

Under the circumstances, I am not prepared to receive the unsworn complaint which we have here. By saying that this in some way goes to Mr. Fugazy's character, it would seem to me that the prejudicial effect of this unsworn complaint outweighs its probative value.

I am prepared to rule on L.

MR. SANTORA: May I say that the memorandum of intent was signed prior to that settlement. I don't think this witness will have any difficulty identifying this as a complaint that was filed by his company under his auspices.

In other words, I am saying while we negotiated

in June of 1967, as to an event that happened in August, 1967, concerning things of this nature, while they may have a prejudicial effect, I don't see any evidence of a prejudicial effect. I think it is quite crucial to our counterclaim to have what was discussed and what was not discussed.

THE COURT: What is your representation to the Court now? That this complaint of a pending action in this Court which was, as I understand it, settled and dismissed before September or October 10, 1967, should be admitted? I think you are going to have to explain it just a little more than you have.

MR. SANTORA: Let me say this: The June 30th statement, which was to be provided under the memorandum of intent which was signed July 18th, and that financial came and included this lawsuit as a settlement of a promissory note.

MR. FREDERICKS: That is erroneous. It did not include it at all. Those statements were prepared according to the date on them, September 13, 1967, for the period ending June 30th.

Now, they were not on it because they were prepared in September and the lawsuit was resolved in August.

THE COURT: Are you telling me that this complaint was duly filed in this Court?

MR. SANTORA: I don't think he ever filed it.

THE COURT: I see no civil number on there. He never filed it at all? Under the circumstances, the document not even apparently having been filed in this Court and being unsworn to, the maker of the document not being on the stand and available for cross examination, there appearing to be an attorney's signature there, not the witness' signature, for all those reasons the objection is sustained.

MR. FREDERICKS: I withdraw the objection to K.

THE COURT: With reference to K, that objection is being withdrawn and that is received.

* * * * *

pgbr 10 Marx-cross

to the document, Mr. Fruchtman.

Q Do you recall seeing it again after that, sir?

A No, I don't.

Q I show you what is Defendants' Exhibit K in evidence, which is an assignment, ladies and gentlemen, dated August 22, 1967 to Marx & Co., Inc., a New York corporation, from George E. Allen, a successor trustee of Tower Credit Corporation, et al.

Mr. Marx, tell me the circumstances surrounding your obtaining that assignment?

A This was the culmination of a rather lengthy and extensive negotiation relative to notes that were originally outstanding in the purchase of Fugazy Travel Bureau in 1963. Those notes refer to $900,000 and they were settled $265,000.

In the course of this final settlement there had been some escrowed securities for Louis and William Fugazy with Tower. Ifyou will recall, Tower was the company that I bought Fugazy Travel from. In the final settlement those claims or those protections were assigned back to me.

Q I show you what is Exhibit 45 in evidence, the defendant Diners' Club listing application, and I ask you whether or not the footnote to the financil sttement, paragraph, relates to the transaction that you have just

* * * * *

terminated?

A I don't know really.

Q Do you remember if anyone gave notice to Diners as to when that option was to expire?

A That option was in the document.

Q Did you give notice as you were required to?

A I certainly didn't. Maybe it was done by my attorneys.

Q Do you know when the Travelco option was exercised, if ever?

A No, I don't.

Q In answer to Mr. Fredericks' questions you said that Exhibit K related to some stock that was escrowed to Mr. William and Louis Fugazy, do you recall that?

A Yes.

Q Do you recall that the nature of the claims were you were getting this assignment?

MR. FREDERICKS: I object to that.

THE COURT Sustained.

Doesn't the assignment speak for itself, counsel?

Q Do you know the nature of the claims out of which this assignment arose?

MR. FREDERICKS: I will object to that, your Honor.

THE COURT: Overruled.

MR. FREDERICKS: There is no testimony there were any claims. It is "claims if any." This presupposes --

THE COURT: Go back one question in view of the "if any".

Sustained.

You may inquire.

Q Do you know what claims Tower had against the Fugazys that were assigned to you in this document?

A There were no claims. It was simply an overall legal document in which at the time of the purchase by me the claims that the Fugazys may have had against Tower were set up and these claims which were non-existent were transferred to me.

Q Were these claims due or based on breach of warranties and representations, to your knowledge?

MR. FREDERICKS: Objection, your Honor. Counsel is testifying, not the witness.

THE COURT: Overruled. He has asked a question "to his knowledge".

A I do not know the answer to that.

Q When you got this assignment, did you discuss it with Mr. Fugazy at all, Exhibit K?

A I did not, no.

AFTERNOON SESSION

2:00 p.m.

(Jury in box.)

THE COURT: Good afternoon, ladies and gentlemen.

You may proceed, Mr. Santora.

MR. SANTORA: The defense calls Mr. William Fugazy.

W I L L I A M D E N N I S F U G A Z Y, recalled as a witness on behalf of the defendants, again being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SANTORA:

Q Mr. Fugazy, I put before you Defendants' Exhibit FFF. I ask you to look at the signature page, please, and tell me if that is your signature.

A It would appear so, yes.

Q Is it your recollection that on or about August 1, 1967, you were a shareholder in Travelco?

A August 1st? I would say so, yes, sir.

MR. SANTORA: Your Honor, FFF was offered before. I offer it again.

MR. FREDERICKS: No objection.

THE COURT: Received. What is it? Will you describe it?

THE CLERK: It is an agreement dated 8/1/67.

(Defendants' Exhibit FFF received in evidence.)

Q Mr. Fugazy, do you recall how long your indemnity requirement to Mr. Fruchtman remained in effect after August 1, 1967?

A No.

Q I show you Defendants' Exhibit EEE in evidence and ask you if that is your signature appearing on the bottom?

A Yes.

Q With respect to FFF, the agreement of August 1, 1967, will you please look at the first paragraph?

Is it your recollection that the owners of the shares of Travelco were William Fugazy, Louis Fugazy and Erwin Fruchtman?

A When?

Q August 1, 1967.

A Correct.

MR. SANTORA: I would like to read to the jury from Exhibit EEE in evidence, if I may.

THE COURT: You may.

(Mr. Santora reads to the jury from Defendants'

Exhibit EEE in evidence.)

Q The reference to Travelco, INc., a New York corporation, is that the corporation that owned the office at 342 Madison Avenue?

A That is correct.

THE COURT: EEE is dated October 30, 1967.

MR. SANTORA: Very well.

Q Mr. Fugazy, I show you a document called Defendants' Exhibit AAAA. I ask you if that is your signature or your initials on the bottom of that.

A I would think so.

Q I show you Exhibit BBBB and CCCC for identification.

By the way, Mr. Fugazy, was the office at 342 Madison Avenue at 43rd Street?

A Yes.

MR. SANTORA: Your Honor, with respect to AAAA, I offer this document in evidence.

MR. FREDERICKS: Your Honor, of all the documents shown to me I would have to object to this, unless I get some foundation as to what the document relates to. It does not indicate on the face of it what company it relates to. I feel I must object at this time respectfully to this document, unless I get some further information.

THE COURT: I will look at it. Why don't you ask a few more questions. It is really a matter of foundation. I think I see the relevancy of it.

MR. FREDERICKS: I didn't object to its relevancy.

Q Who is Carmen Rodriguez?

A She was the manager of the 43rd Street office.

Q Was she a manager of Fugazy Travel at one point in 1967?

A I can't answer that question. I don't know what you mean by Fugazy Travel Bureau.

Q Prior to the sale to Diners'.

A Prior to the sale? Your Honor, I would have to answer that with an explanation, if I may.

THE COURT: You can answer it in that fashion.

A No.

THE COURT: Either ask another question or abandon the attempt.

Q Now, on November 21, 1967, did Carmen Rodriguez have any connection with Diners'/Fugazy Travel Bureau?

A I have to answer it with an explanation.

THE COURT: Go ahead.

A Diners'/Fugazy Travel franchised 342 Madison

Avenue as a brach of Diners'/Fugazy Travel, because that is the way the air appointments had to be made. Diners'/Fugazy Travel was being paid a management fee to run the Travelco office of some $45,000 a year.

So whether Carmen Rodriguez would be considered an employee of Diners'/Fugazy Travel or Travelco, I am not able to answer. It was listed as a brach of Diners'/Fugazy Travel, so, technically, she qualified under the airline appointments as an employee of the branch of the parent company.

In fact, she was an employee of Travelco.

MR. FREDERICKS: I move to strike it.

THE COURT: Yes. The jury will disregard the answer.

Q You say Miss Rodriguez was an employee of Travelco?

A Of Diners'/Fugazy Travel.

Q Was she paid by Diners'/Fugazy Travel or Travelco?

A Diners'/Fugazy Travel.

Q Who paid Mr. Fruchtman?

A Who paid Mr. Fruchtman what?

Q His salary from 342 Madison Avenue.

A I don't know that he got a salary.

Q I ask you to look at AAAA. I ask you if ever requested that Mr. Fruchtman be paid a salary from Travelco.

A He would be paid out of Diners'/Fugazy Travel charged to Travelco. In other words, Diners'/Fugazy Travel was operating the Travelco office. That is why I say I don't understand, your Honor--how do you say--he is an employee of what.

As far as all records go, it was a Diners'/Fugazy Travel office. Who, in fact, owned it? Travelco.

MR. SANTORA: I move to strike the last part.

THE COURT: Strike it.

MR. SANTORA: With those questions I offer AAAA and BBBB in evidence.

MR. FREDERICKS: May I have a voir dire?

THE COURT: You may. I don't know about the jury, but the Court is somewhat confused at the moment.

VOIR DIRE EXAMINATION

BY MR. FREDERICKS:

Q Tell me, by looking at AAAA, what company does that document relate to, if you know, from that document?

A Well, it would be the 342 Madison Avenue office.

Q Do you know what company that relates to?

A Diners'/Fugazy Travel.

Q You said you would think. Look at the document.

Does the document refresh your recollection as to what company this memorandum related to and the attachment?

A Diners'/Fugazy Travel.

MR. FREDERICKS: I have nothing further. I have no objection to its admission.

THE COURT: That is received.

(Defendants' Exhibit AAAA received in evidence.)

THE COURT: Let me see that a moment.

MR. FREDERICKS: Your Honor, I have to object to BBBB. It does not relate to this witness. It is not written by the witness. It is incomplete on its face. I don't know how you can get in through this witness or anybody other than the two people involved this document. It is not clear on its face what it relates to. It does not relate to Mr. Fugazy.

MR. SANTORA: It seems to be a companion memo.

MR. FREDERICKS: That is an assumption by counsel I'm not prepared to stipulate to and I have to object to the document.

THE COURT: I think you should perhaps inquire orally as to BBBB.

BY MR. SANTORA:

Q Mr. Fugazy, did you have any discussion with Mr. Adler about putting Mr. Fruchtman on the payroll of

Travelco?

A Of Travelco?

Q Of Travelco.

A Not that I recall.

Q Did you have any discussion with Mr. Adler about putting Mr. Fruchtman on anybody's payroll?

A Not that I recall. I signed a memo before, but you are asking me about a conversation with someone else.

MR. SANTORA: I withdraw my offer of BBBB AAAA has been received?

THE COURT: Yes.

BY MR. SANTORA:

Q Mr. Fugazy, is that your signature on CCCC?

A Yes, sir.

Q Do you recall sending this document to Mr. Fruchtman on October 14, 1969?

A I don't remember sending it, but I recall the letter and I recall the circumstances surrounding it.

Q Do you know when 342 Madison became a Diners'/ Fugazy franchise?

A You mean became a Fugazy and then Diners'/ Fugazy?

Q I am asking you when it became a Diners'/

Fugazy Travel branch.

MR. FREDERICKS: I object to the form of the question.

A I don't recall the dates when one company became the other. That is the only reason I cannot answer the question.

Q Did you have any discussions with Mr. Fruchtman about his relationship to Diners'/Fugazy Travel as opposed to any other franchisees of Diners'/Fugazy Travel?

MR. FREDERICKS: I can't object to it since I don't understand it.

Q Did you try to send business to 342 Madison Avenue, to Mr. Fruchtman's office?

A I sent business to all the franchisees.

Q Did you, in fact, give 342 business over other franchisees?

A Not at all.

Q Did you have any concern about your indemnity to Mr. Fruchtman, about the profits or losses at 342 Madison?

MR. FREDERICKS: That question calls for a state of mind and I object to it.

THE COURT: I will sustain the objection.

Q Isn't it a fact that if the 342 Madison office

lost money you were going to have to make it up in an indemnity and repayment of money to Mr. Fruchtman?

MR. FREDERICKS: I object to the question.

THE COURT: I will allow it.

A I think the answer is no. I merely had to guarantee Fruchtman, as I recall it, if Travelco was not able to pay over the loan to the bank, and that was paid over very shortly. I think they paid the loan off to the bank in six or seven months.

I don't know. So I don't think that indemnity carried on any more.

THE COURT: I don't think that was the question.

THE WITNESS: You have to give us the time frame, because we sold the office to Fruchtman in June and I think the bank was paid off in January.

THE COURT: Restate your question in view of the witness' answer.

Q Was there any period of time, Mr. Fugazy, when you were liable on your indemnity to Mr. Fruchtman for losses suffered at 342?

A No, never.

THE COURT: What about this period?

THE WITNESS: Your Honor, the indemnity was not against losses. The indemnity was Fruchtman borrowed

$75,000 from the bank, and my brother and I guaranteed him if he had to make good on this loan we would make good, and that after the Franklin Bank was paid off we would get 60 per cent of the stock and he would get 40.

It doesn't have anything to do with losses at all. That is why when this conversation was going this morning I did not understand it.

Q Do you know how the loan was paid back?

A By Travelco.

Q Where did Travelco get the money?

A By making profits.

Q Profits from the business at 342?

A That is the business they were in.

MR. SANTORA: I would like to offer CCCC in evidence, your Honor.

MR. FREDERICKS: I have no objection.

THE COURT: Received.

(Defendants' Exhibit CCC received in evidence.)

MR. SANTORA: I would like to read from Exhibit CCCC.

THE COURT: You may.

(Mr. Santora reads to the jury from Defendants' Exhibit CCCC in evidence.)

MR. FREDERICKS: Your Honor, I would like to

read the rest of it--I would like to read it all.

THE COURT: You may.

(Mr. Fredericks reads from Defendants' Exhibit CCCC in evidence to the jury.)

BY MR. SANTORA:

Q You mentioned a moment ago that after payment to Fruchtman you would wind up owning 60 per cent of the stock?

A Something like that, 59--control. I have not seen the papers.

Q That was the stock of Travelco?

A Yes. I don't know if it was 60.

mmbr 1 W.Fugazy-direct

Q Did you own stock in any other franchisees of Diners/Fugazy Travel?

A No -- excuse me -- before I answer, Travelco, 43rd Street, eventually opened up, because Bloomingdale committed to it at Bonwit-Tellers and other places. I was no longer a stockholder, but Travelco had other branches. I wanted to make sure you understood that.

MR. SANTORA: I move to strike.

THE COURT: Strike it. Try, Mr. Fugazy, just to answer the questions which counsel asks you.

Q After October 14, 1969, which is the date of the letter you just saw, Mr. Fugazy, is there anything you can think of you did to see that Travelco or 342 Madison Avenue didn't lose any money?

A I don't think that is what that letter said.

THE COURT: Just try to answer the question.

A No.

Q Do you recall an order for travel business with State Farm Insurance Company, Mr. Fugazy?

A I recall it, yes.

Q Do you recall what amount that business was?

A No, I don't.

Q If I suggest to you $50,000, does that refresh your recollection at all?

A No.

Q Now, did you negotiate with State Farm?

A Not at all.

Q Who did?

A Jerry Brooks, Jack Moses, Louis Fugazy.

Q Did there come a time when State Farm paid a check for the travel business that was going to be done?

A I don't know. I am not aware of it if they did.

Q Do you recall receiving or having further received a $50,000 check from State Farm?

A I am not aware of it. I never received it. I don't know about it. At least, I don't recall it.

Q Do you recall yesterday, Mr. Fugazy, we spoke with Mr. Marx about the franchise concept in '66 and '65?

A Yes, sir.

Q Do you remember Mr. Marx said that you and he had developed the concept?

A Yes.

Q Now, just briefly can you tell me, Mr Fugazy, if there was any written report prepared in 1966 analyzing the position of the franchisee and what the franchisee would need to break even under your system?

A There were quite a few of them. We had outside people do it and we did it internally. We did quite a

few reports.

Q Do you know where those reports are today?

A They were given to Diners' Club. I may have some copies. But I don't recall.

Q Do you know who prepared them?

A A company called Kaufman Associates did one; Harris, the survey people, they call it the Harris Survey -- but it is a marketing arm of the Harris Company, they did an extensive one for us. And we did one. We did one with the marketing arm of Touche, Ross, which we had done on our department store program, which we gave to Diners' before we were involved with Diners'.

Q Do you recall how much gross volume a franchisee needed to break even?

A There is no way anyone can answer that question. You have to give me the situation, where he is located, what his overhead is, and I will tell you.

THE COURT: In other words, if you had high rent it would take more to break even.

THE WITNESS: It would be different. For instance they opened one on Park Avenue where the rent was $3,000 a month. You would have to do a hundred thousand a month to break even.

Q Mr. Fugazy, I show you Defendants' Exhibit LLL and

inquire.

BY MR. SANTORA:

Q Mr. Fugazy, in 1961 when you sold to Tower Company, was your franchise or license program in operation at that time?

MR. FREDERICKS: Objection, your Honor.

THE COURT: Overruled.

A We didn't have a licensing franchise program at that time.

Q The organization that you just mentioned, was that in being at the time you were discussing with Tower to sell your company to Tower?

MR. FREDERICKS: I object. I heard of no organization. I object to the form and I object on the grounds of relevance.

THE COURT: Sustained as to form.

Q Did you have these offices in being when you were talking to the representatives in Tower in 1961, Mr. Fugazy?

A I can't remember. I would say we had some, and it would appear to me that we bought them back. I just don't remember, your Honor, it is so long ago.

Q Did they operate at all when Tower had the company?

* * * * *

pm

Q Mr. Fugazy, do you recall I asked you at your first session whether or not Mr. Marx had any claims against you. I believe you said you didn't recall any. Have you had a chance to think of any since that time?

A Otherthan the ones I have discussed in my pretrials I am not aware of any.

Q Are you familiar with Exhibit D for identification?

A I have seen it before, yes.

Q Is there still money owing from you to Mr. Marx in connection with this document?

MR. FREDERICKS: Objection, your Honor. The document is not in evidence.

A Not at all.

THE COURT: He has answered it.

Q On August 24, 1970, were you a director of the Diners' Club or Dinrs/Fugazy Travel?

A August 27th?

Q August 24, 1970.

A I was a director of Diners' Club. I don't believe I was a director of Diners/Fugazy. I stayed on the Diners' board for six or eight months after I resigned from Diners/Fugazy.

MR. SANTORA: I offer Defendants' Exhibit D in evidence.

* * * * *

was a director and he was talking to Marx when Marx was bringing suit against his company. Part of our counterclaim is breach of fiduciary duty, which continued in August of 1970, as it had been for the three previous years. With respect to the credibility of the witness it is relevant.

THE COURT: If he had prepared this, if he signed it, if it represented a statement which he had made which is inconsistent with what he has said here, fine; but you are not going to put this document in through this witness.

MR. SANTORA: All right.

CROSS EXAMINATION

BY MR. FREDERICKS:

Q Mr. Fugazy, did you own on October 30, 1967, when you executed Defendants' Exhibit EEE in evidence, any interest in Travelco?

A No.

MR. FREDERICKS: I have no further questions of this witness, your Honor.

THE COURT: Is there anything further?

MR.SANTORA: I would like to read in the witness' answer to an interrogatory which has been marked in this case. It was marked today as an exhibit,

Defendants' Exhibit DDDD.

I am reading from the answer to No. 27. Before I do this I would like to ask this of the witness:

REDIRECT EXAMINATION

BY MR. SANTORA:

Q Mr. Fugazy, I would like to ask you if this is your signature on this document (handing).

MR. FREDERICKS: We will so stipulate it is his signature.

MR. SANTORA: Dated November 15, 1974.

The answer to No. 27 is: From 1967 to 1972 Louis Fugazy, William Fugazy, Erwin Fruchtman, and Milton Adler were the officers and directors of Travelco.

RECROSS EXAMINATION

BY MR. FREDERICKS:

Q Your Honor, I would like to read from Defendants' Exhibit EEE.

Otto Marx, Jr., William Denis Fugazy and Louis Fugazy, being duly sworn, each for himself, deposes and says that he and all members of his family have divested themselves of any interest, direct or indirect, that he or they may have had in any "franchisee," as that term is defined in the purchase agreement dated October 10, 1967, between Diners' Club, Inc. and Fugazy Travel Bureau, Inc.,

a Pennsylvania corporation, and Travelco, Inc., a New York Corporation.

BY MR. FREDERICKS:

Q Mr.Fugazy, this document is dated the 30th day of October 1967. At the time you signed this document, did you have any interests, direct or indirect, in the companies referred to?

A None whatsoever.

MR. FREDERICKS: No further questions.

MR. SANTORA: No further questions.

THE COURT: You may step down.

(Witness excused.)

MR. SANTORA: The defendants next witness is Mr. Seymour Flug.

S E Y M O U R F L U G, called as a witness by the defendants, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SANTORA:

Q Where do you reside?

A 9 Robin Lane, Plainview, Long Island.

Q What is your present occupation?

A I am vice president and assistant to the chairman of the board of the Amerada Hess Corporation.

* * * * *

of Nixon, Hargraves, Devens & Dea.

Then commencing the beginning of 1956 I joined Afgo Credit Corporation, a wholly-owned subsidiary of the Continental Corporation in insurance premium financing as assistant to the president, became executive vice president in 1957, became president and chief executive officer in 1958, remained in this position through 1969, at which time I went in March, 1969, to Diners' Club as president and chief operating officer, and in December, 1969, became president and chief executive officer, and in January, 1971, became vice chairman of the board of Diners' and left Diners' in March of 1972.

THE COURT: So your period of service in Diners' was from when to when?

THE WITNESS: I went on the board in '67, in January, I believe. So the directorship ran from 1967 to 1972, and the officership was from March 1969 to March 1972.

Q Mr. Faunce, I show you a copy of Plaintiffs' Exhibit 27. I ask you if you have seen a copy of that before, sir?

A Yes, I have.

Q Do you recall having any discussions with the author of that letter on or after the date that appears on

that letter, sir?

MR. FREDERICKS: Since it is in evidence, can we get the date so the jury and I can focus on the time span, please?

THE COURT: Yes, that is appropriate. The letter, as I recall it, is dated April 16, 1969.

THE WITNESS: That is correct.

THE COURT: Will you indicate to the jury and counsel who the author or authors are?

THE WITNESS: Mr. Otto Marx.

THE COURT: Very well. That is the letter, ladies and gentlemen, requesting registration.

MR. SANTORA: Yes, it is.

MR. FREDERICKS: Can we get the answer to the question?

THE COURT: Yes. I don't think that an answer was given yet.

THE WITNESS: Will you repeat the question?

(Question read as follows:

"Do you recall having any discussions with the author of that letter on or after the date that appears on that letter, sir?")

A Shortly thereafter. I don't remeber the precise date. I recall having lunch with Mr. Marx. I was his

guest at lunch and we discussed this subject.

Q I show you, Mr. Faunce, Defendants' Exhibit MMM for identification and ask you if you are familiar with that document or the document of which that is a copy?

A Yes.

Q Do you recall receiving that document on or about the date that it bears, sir?

A Yes, I do.

MR. SANTORA: Your Honor, I offer Exhibit MMM in evidence.

THE COURT: Show it to counsel.

MR. FREDERICKS: No objection.

THE COURT: Very well. Received.

(Defendants' Exhibit MMM was received in evidence.)

THE COURT: I note that the document which has been received consists of a three-page letter and two pages of handwritten notes? Is that right, gentlemen?

MR. SANTORA: Yes.

MR. FREDERICKS: Unfortunately, I don't have the handwritten notes.

THE COURT: I thought the document had been shown to you.

MR. FREDERICKS: Your Honor, I have no objection

to the document. I must object to the attachment.

THE COURT: Do you want to offer the attachment?

If you do so, I suggest you inquire further of the witness.

MR. SANTORA: I can offer it without the attachment.

BY MR. SANTORA:

Q Mr. Faunce, can you tell us when it was you spoke with Mr. Marx, the conversation that you are just referring to a moment ago?

A Shortly before this letter. It was in May of 1969. I don't know the exact date. He refers to lunch last week on the 19th. So it was the week preceding that.

MR. SANTORA: I would like to read from the portion of this exhibit, MMM in evidence to the jury.

THE COURT: You may.

(Mr. Santora reads from Defendants' Exhibit MMM to the jury.)

Q Will you tell us as best you can recall, Mr. Faunce what you and Mr. Marx discussed at your luncheon?

MR. FREDERICKS: I think in view of the Court's policy to permit the other side to read the balance of any document, I would like to read the balance of this letter.

THE COURT: You may do so.

(Mr. Fredericks reads from Defendants' Exhibit MMM

in evidence t the jury.)

BY MR. SANTORA:

Q Mr. Faunce, do you recall when Mr. Marx returned from Europe?

A Not specifically. It was several weeks later, I think some time in June. But I have no specific recollection.

Q Do you recall that as of May 19, 1969, Mr. Marx had not made up his mind whether he wanted his shares registered?

MR. FREDERICKS: Objection.

THE COURT: Sustained.

Q When was the next discussion you had with Mr. Marx on the alternative plan to registration?

A I do not recall for sure any subsequent discussion I had with Mr. Marx, counsel, or others. I am sure I did. I don't recall any subsequent discussion.

MR. SANTORA: Your Honor, I would like to read from Exhibit PPP in evidence, which is the letter dated July 15, 1969, Mr. George Faunce, III to F.T. Ventures, Inc., care of Mr. Otto Marx, Jr.

(Mr. Santora reads from Defendants' Exhibit PPP in evidence to the jury.)

BY MR. SANTORA:

Q Now, Mr. Faunce, following July 15, 1969, do you know if Diners' Club received a check from Mr. Marx as requested in that letter?

A It did not.

THE COURT: Did Diners' Club receive any check from Mr. Fugazy or any other person in connection with that request for reimbursement?

THE WITNESS: It did not, your Honor.

Q How about F.T. Ventures, did they receive a check from F.T. Ventures, either?

A No.

Q I show you a document, RRRR. I ask you if you

are familiar with that document, sir.

A It appears to be my copy of the December 31, 1969 Diners'/Fugazy Travel branch operating result reports and balance sheets. It is done quarterly. This is the December 31, 1969 set of these reports.

THE COURT: When did you receive that copy, sir?

THE WITNESS: To the best of my recollection, these reports would normally come over about six weeks following the end of a quarter, six weeks to two months.

So I would think about mid-February, late February.

THE COURT: 1970?

THE WITNESS: 1970.

Q Was it your policy to receive and maintain those reports of which that is one, Mr. Faunce, in the regular course of your activities as president of Diners' Club?

A Yes, it was.

Q And did you maintain that copy in your files upon receipt of it?

A Yes, I did.

Q Did you ever surrender possession of that?

A When I left Diners' Club, like all of my files, it would have been turned over to Mr. Newell Lusby, the

president, in 1972.

Q Did you read these reports when you received them, Mr. Faunce?

A Yes. I did not read every line of every statement, but I reviewed them. It was my practice to review them rather carefully and discuss them with my associates.

Q Is it your practice to do so as president of Diners' Club?

A Yes.

Q Is it your practice--

MR. FREDERICKS: Mr. Santora, you are leading this man continually.

THE COURT: He is correct. The next question should be in proper form.

Q What was your practice with respect to the maintenance of that document in your files, Mr. Faunce?

A Following review and such discussions as we would have each quarter, it would be filed in its proper place, next to the previous quarter.

Q In what place is that, sir?

A Well, frankly, my secretary usually filed them in the appropriate file drawer where she could find it and get it when it was needed.

Q Which file drawers?

A File drawers that were at 10 Columbus Circle.

MR. SANTORA: I offer RRRR.

VOIR DIRE EXAMINATION

BY MR. FREDERICKS:

Q Do you know whether that document is in the same condition as when you last saw it? Can you tell me whether any part of it has been taken out or removed?

A No, I can't. I have no reason to know one way or the other.

Q Mr. Faunce, the franchisees paid Diners'/Fugazy a royalty, did they not, based upon their gross earnings?

A That is my recollection, yes.

Q Therefore, sir, if their earning reports were less than they actually earned, they would wind up paying the company less money than they owed?

MR. SANTORA: I object to that as to form.

THE COURT: If the witness understands the question I will let him answer it. If you don't or if you take issue with the premise, you may say so.

A I believe that is correct, with the caveat that Diners'/Fugazy Travel had traveling auditors whose purpose was to go about checking the franchise records to see that there were proper reports being submitted.

Q Have you ever expressed the opinion to anyone

that you felt that the franchisees were not presenting the full picture in these reports?

A As respects franchisees generally? Or specific franchisees?

Q I will take it either way, Mr. Faunce. Did you ever express the opinion in form or in substance that the franchisees were not giving the Diners' organization a full and proper report?

MR. SANTORA: I object to that.

THE COURT: Overruled. It is proper examination.

A I don't recall having ever felt that I had the basis of first-hand knowledge of it even to justify such an opinion.

Q Well, did you ever make the statement to anyone that these franchisees were really never reporting properly?

A I have no recollection of it, but I could have. It could be that I did, but I do not recall it.

Q Do you recall Mr. Flug advising you that he thought these reports were inaccurate?

A Inaccurate, yes, yes, because they were prepared by the franchisees who were not financially trained people.

Q So the basic people who reported these figures, Mr. Flug expressed to you that the reports were inaccurate, didn't he?

A Yes. It is not to say that they were all inaccurate or totally wrong.

Q And you agreed with that at the time?

A Inaccurate in an absolute sense that they were not like a certified balance sheet, that is right.

Q And they may have contained in some instances the right information, in some instances the wrong information?

THE COURT: Do you know that, sir?

A No, I do not know of specific improper information. I was going to say, we know, for instance, that sometimes some franchisees out of the 150, they would forget to send a report in, so it would be missing, and you would not have a complete picture.

Sometimes the information that they sent was more incomplete than inaccurate, which made it difficult when you are putting it into a standard format for the purpose of this overall report.

Q And sometimes it was just plain inaccurate?

A Any inaccuracies which were detected or determined on audit or otherwise, would be corrected.

Q You have no doubt that any inaccuracies that were determined would be corrected?

MR. SANTORA: I move to strike that.

THE COURT: Yes.

MR. FREDERICKS: I object to this, and on the basis of this witness' testimony I ask your Honor to reconsider the admission of the prior document SSSS. I think we have laid a substantial foundation for the inaccuracies or possible inaccuracies of these documents.

THE COURT: Overruled. However, the weight to be given to those two documents, RRRR and SSSS, will be for the jury. I have heard certain testimony, and I would suggest that when you scrutinize these particular documents, in the event you call for them, that you weigh them carefully.

(Defendants' Exhibit RRRR received in evidence.)

CROSS EXAMINATION

BY MR. FREDERICKS:

Q Mr. Faunce, counsel asked you about a meeting, the first time you had a meeting with Mr. Marx after April 16th, and you told us you had lunch with him? Is that correct?

A That is correct.

Q Would you mind telling us what was said at that

luncheon meeting, what Mr. Marx said to you, if you can recall, what you said to him?

A This is six years ago, but as best I recall it, there were preliminary discussions. A general one was about the travel operations and the past background of F.T. Ventures in the future and expectations.

It was of a general nature. And then a certain amount of time was given to discussing the registration and a possible alternative to registration, which Mr. Marx later described in a letter.

Q Were you interested in exploring possible alternatives in registration?

A I was perfectly willing to listen to all alternatives, sure, yes. We were not interested in the sense that we were seeking out alternatives that I recall, but we were perfectly happy to.

Q You were perfectly delighted in filing a registration statement at that time?

A As I recall, we were obligated to.

Q I recognize your obligation, Mr. Faunce I am trying to find out what the concensus was. Were you delighted? Were you looking forward to the opportunity?

MR. SANTORA: I object to that.

THE COURT: Sustained.

Q Mr. Faunce, when was the last time, if you know, prior to that date that Diners' Club had filed a registration statement?

MR. SANTORA: I beg your pardon. What date?

MR. FREDERICKS: I will withdraw that question, your Honor, and will substitute this question.

Q Mr. Faunce, do you recognize Exhibit 30, sir?

A It appears to be a registration statement filed subsequent to the dates we are talking about.

Q Do you see a date on there?

A August 28, 1969, Form S-1.

Q Did you have anything to do with the filing of this registration statement?

A There were countless meetings we had on that, the lawyers and financial people, leading up to that.

MR. SANTORA: When the witness is answering please don't raise your hand signaling him to stop.

THE COURT: Let's go on.

Q Prior to the filing of that registration statement on August 28, 1969, when had Diners' filed a previous registration statement, if you know, sir?

A I do not recall any involvement in any other filing of registration during my involvement with Diners'.

Q How long were you involved with Diners'?

A As a director from January 1967 to March 1972, and I was up there on a full time basis in '69, March--well, I actually arrived on the scene on April Fool's Day.

Q You know who Mr. Jules Asch is?

A Yes, I do, indeed.

Q Who is he?

A He is the chief financial officer of Diners' Club.

Q And he was there at the time that you were president of the company?

A Oh, yes, he had been there for many years.

Q He had been there before you?

A Yes, many years.

Q And if Mr. Asch says that he hadn't filed one since the 1950s, you have no reason to doubt Mr. Asch's statement?

A No.

Q When you met with Mr. Brooks in May of 1969, Diners' Club had not filed a registration statement for some period of time?

A That could well be. I certainly have no recollection of it at all.

Q Do you know what is involved in filing a

registration statement?

A Far more than I wish, because there was very much involved in that one.

Q So that when you met with Mr. Marx in May of 1969, you say you were interested in talking about alternatives. Was Diners' Club anxious to file a registration statement?

A Mr. Fredericks, I knew nothing about registration statements. I had no basis for not being anxious or being anxious, because I knew nothing. At that point I was rather innocent and naive as to the details involved. They requested it just a few weeks before.

Q A few weeks before? And what did you do with Mr. Marx's letter of request, sir? Do you remember?

A I believe the letter of request went to Mr. Bloomingdale.

Q You saw it?

A I saw it

Q You got a copy of it?

A Yes.

Q Did you do anything with it?

A I don't recall taking the initial action with it. It undoubtedly went to our counsel in the first instance, our outside counsel, I am sure, would have been

immediately called upon to corroborate the letter of April 16th stated the terms of the agreement appropriately.

MR. FREDERICKS: You took my Exhibit 27. You showed it to the witness on direct examination. May I have it back, please?

Q When you received the letter from Mr. Bloomingdale, do you recall taking any affirmative action?

A I do not recall. I can only surmise what I logically would have done.

Q What was that?

A To get hold of our outside counsel, our financial people, or Mr. Asch or Mr. Flug to discuss what the next step would be.

Q How about notifying the Continental people?

A It could well have been.

Q That would have been a natural step at that time, to notify Continental?

A I could have notified Continental.

Q Would you have notified Mr. Herd? Mr. Johnson?

A I might well have.

Q You kept them pretty much informed of what was going on in Diners' Club?

MR. SANTORA: I'm going to object to that in

form.

THE COURT: Well, you had come from a Continental subsidiary, as I recall?

THE WITNESS: Yes.

THE COURT: And you are saying if you had received a request such as this you would have most likely have taken the matter up with someone at Continental? Is that right?

THE WITNESS: Both the gentlemen mentioned by Mr. Fredericks were directors of Diners' Club.

THE COURT: I recall that is the fact.

Q Did you send a copy to Mr. Mahoney? He was a director of Diners' Club, wasn't he? Did you send him a copy and notify him of what was happening?

A No.

Q How about the other members of the Diners' Club board of directors, did you send them copies? Let them know what was happening?

A Other than Mr. Asch and Mr. Bloomingdale.

Q But you did let Mr. Herd and Mr. Johnson know?

A Yes, I did.

Q You let them know or did you make inquiry of them?

A I would let them know, because Continental was

intimately and heavily involved financially and was interested in the financial matters of Diners'.

Q Was this a financial matter or a request to file a registration?

A A request to file a registration statement.

Q What relationship does this have to financial matters?

A Well, they are familiar with that sort of thing and can provide perhaps some advice. I have no idea.

Q Did you solicit their advice?

A As I say, I have no specific recollection of any discussions on the registration request with Mr. Johnson or Mr. Herd, but I could well have had it.

Q How about written communications?

A I have no recollection, present recollection of it, but it could well have been.

MR. FREDERICKS: I would like to read, your Honor, from Exhibit 27.

Q Is that your signature, Mr. Witness?

A Yes.

MR. FREDERICKS: Exhibit 27--who is Harold?

THE WITNESS: That would be Harold Johnson.

MR. FREDERICKS: "Harold: Alfred asked me to

send this to you and Mr. Herd. He wants to know your position."

THE WITNESS: Well, Mr. Bloomingdale got the letter. That is self-explanatory. He asked me to send it down to him, and I frankly forgot. That was six years ago, April.

Q Did you get a response?

A I don't recall what the response was. I recall becoming aware from lawyers and others that, yes, in fact we were obligated to proceed with the registration.

Q I show you what has been marked Exhibit 22, which says, "Mr. Herd from Harold Johnson."

"The attached letter, I believe, is an effort on the part of Otto Marx, Jr. to have Continental purchase his shares. To my way of thinking, there is nothing that needs to be done at the present time. Mr. Bloomingdale may discuss this at a later date, but my reaction is to do nothing."

Do you recall seeing that?

A I don't appear to have a copy of that.

Q Do you recall seeing it? Do you recall having such a conversation with Mr. Johnson?

A I do not. I recall, in fact, proceeding to move towards that registration rather vigorously all spring

and summer.

MR. FREDERICKS: Your Honor, I am going to move to strike that last comment "vigorously."

THE COURT: It is not responsive to the question.

MR. FREDERICKS: And it is an opinion.

THE WITNESS: I don't recall seeing that letter.

THE COURT: Well, I would leave that out, the witness' last comment that he proceeded vigorously. That is going to be stricken, ladies and gentlemen, because it was not responsive to Mr. Fredericks' question, and, therefore, you should disregard it.

Q Mr. Faunce, you solicited the opinions or you asked for the opinions of Mr. Herd and Mr. Johnson concerning Mr. Marx's letter.

Did you ever get their opinions or their positions on the matter?

MR. SANTORA: I am going to object to the question. There is a preamble to it.

THE COURT: Rephrase the question.

Q Mr. Faunce, you wrote to Mr. Johnson, "Harold: Alfred asked me to send this to you and Mr. Herd. He wants to know your position."

You wrote to Mr. Herd, "Mr. Herd: Alfred asked

that I send this to you and Harold."

Now, did you ever get a response? Did they ever tell you what their position was?

A I have no recollection of the response. It would be likely that I would, but I don't recall it.

Q You have no recollection?

A No recollection of the response.

Q You say you proceeded. What did you do, Mr. Faunce, after you got the letter of the 16th of April?

A Specifically, the next thing I remember is the luncheon soon thereafter with Mr. Marx.

Q Mr. Faunce, I asked you, what did you do to get this registration statement moving? It was your obligation. What did you do?

MR. SANTORA: I object.

THE COURT: The question was capable of the construction the witness put on it. It has been answered. It will stand.

Now, a more defined question has been asked. Will you answer that, sir?

A I have no specific recollection what lawyers or financial people we talked to. I just don't know what the next step was.

Q I didn't ask what the next step was. I said

what did you do.

A The letter addressed to Mr. Bloomingdale? What I did?

Q Mr. Faunce, if I understood you, you said you moved this vigorously. I want to know what you, George Faunce, president of the company, did.

A Well, in the time subsequent to Mr. Marx's return and a decision that had been made not to proceed with an alternative, that we proceed with registration, there were numerous meetings involving counsel, financial people--Mr. Fugazy was present at some--to get a registration statement together which led to the filing on August 28th.

Q Who made the decision not to proceed with an alternative?

A I believe it was--as best I recall, it was our financial people felt it was not a financially viable alternative.

Q When was that decision not to proceed with an alternative?

A It may be that the board of directors considered it. It well may be.

Q Well, was the matter presented to the board of directors?

A I do not recall. You asked who acted on it.

Q Do you recall, sir, when the decision was made not to proceed with any alternatives?

A To the best of my recollection during the period between Mr. Marx's letter and while he was off on his trip, between then and the time he came back this matter was being considered, and it was some point in June, I believe. I do not know the date. No, I do not know the precise timing of this decision.

Q So sometime in June a decision was made not to proceed with alternatives and at that point you proceeded to prepare or set the wheels in motion to get this registration statement started?

MR. SANTORA: I object to that. It is presuming something.

THE COURT: I will let the witness answer if he can. If that statement is totally correct, say so. If it is not so, say so.

A To the best of my recollection once the decision was made not to proceed with an alternative, there ensued a series of meetings and consultations leading to the preparation of the document.

Of course, there was an effort made to collect the agreed-upon one-half cost, and that was not forthcoming.

Q Did the board of directors, sir, if you recall, ever authorize or take any action authorizing the preparation of a registration statement?

A I don't recall whether that was a board action. That is hazy. I am sure they did if it were required to be acted on by the board. But I just don't know.

(Plaintiffs' Exhibit 53 marked for identification.)

Q I am going to show you, Mr. Faunce, this document dated July 25, 1969. I ask you to look at it and tell me whether that refreshes your recollection, sir, as to whether the board of directors of Diners' Club ever considered and approved the preparation of a financial statement.

THE COURT: Financial statement or registration statement?

Q Registration statement.

A Yes.

Q And when was that? What date? Now with your recollection refreshed, tell me what date it was.

A The July board meeting, July 25th, it talks about the S-1 now in preparation. Obviously, it was an ongoing thing and it needed board approval.

MR. SANTORA: Your Honor, I object to the

practice of his leaning over the witness stand and signaling him with his hand when he wants him to stop talking, and I would request that counsel move back to the lectern.

THE COURT: Don't lean over the witness.

MR. FREDERICKS: I apologize.

I will now move it in evidence.

THE COURT: That was not necessary, sir, your offering the document in that way.

MR. FREDERICKS: I am sorry, your Honor.

THE COURT: It was the tone in which you spoke, sir, that I would find inappropriate.

MR. SANTORA: I have no objection.

(Plaintiffs' Exhibit 53 received in evidence.)

THE COURT: What is it?

MR. FREDERICKS: An extract of minutes of the July 19, 1969 meeting.

Q Mr. Faunce, you say you wrote a letter on July 15th, is that correct, asking for payment of half of the $70,270?

A Yes.

Q Was there ever any response to that letter received?

A I believe there was. I don't know whether it was in writing or verbal. I recall an ongoing discussion

about the difficulty of precisely coming up in advance with figures to determine what a half would be.

Q Did there come a time that the moneys that were requested to be advanced by Diners' Club were reduced by some $20,000?

A I recall a reduction, a subsequent reduction when further costs were refined.

Q That was based on an overstatement as to the initial figure set forth in your letter?

MR. SANTORA: I object to that.

THE COURT: In any event, there was a revision of the original figure?

THE WITNESS: There was a downward revision, yes.

Q Did Mr. Marx advise Diners' Club that he was guaranteeing the payment of all properly approved bills in connection with that registration statement?

A I recall him doing that, yes.

MR. FREDERICKS: I have no further questions of this witness, your Honor.

Oh, I would just like him to identify a document for me, if I might, your Honor, and this is for the purposes of identification--no, it won't be necessary.

THE COURT: Very well.

(Defendants' Exhibit UUUU marked for identification.)

REDIRECT EXAMINATION

BY MR. SANTORA:

Q You have before you Defendants' Exhibit UUUU for identification. Are you familiar with that document, sir, or a document of which that is a copy?

A I am sure I saw it six years ago. I can see what it is. It is the minutes of the meeting of May 21st, board meeting.

Q What board meeting?

A Diners' Club.

Q Do you recall being in attendance at the meeting of the board of directors of Diners' Club on May 21, 1969?

A Yes, it says here that I was.

THE COURT: That refreshes your recollection?

THE WITNESS: That refreshes my recollection, and I never missed a meeting, anyway.

Q Do you recall discussing the registration statement at that meeting, Mr. Faunce?

A I have no specific recollection. I see on the second page--

MR. FREDERICKS: If your Honor please--

THE COURT: He has no specific recollection.

MR. SANTORA: I move these documents into evidence, UUUU.

THE COURT: You are representing this as a true copy of the minutes of that particular meeting of the board of directors?

MR. SANTORA: Yes, your Honor.

THE COURT: Show it to counsel.

MR. FREDERICKS: Objection, your Honor.

THE COURT: State your grounds.

MR. FREDERICKS: The document in the first instance is not signed. In the second instance, I have heard no proper foundation for the document. I don't know who prepared it, whether he was present, and the manner in which it was prepared.

If this were a true copy, I assume it would have been signed by the secretary in charge of the meeting.

THE COURT: Normally they are. Do you have an original or a photocopy of the original? That seems to be the objection.

MR. SANTORA: We don't have it, but Mr. Weber is in the courtroom.

THE COURT: If you wish to have Mr. Weber call to testify on this subject, I will require it. If your

objection is that it is not signed, since Mr. Weber is in the courtroom I will give you the option.

MR. FREDERICKS: Your Honor, I cannot in any way weigh the value or the propriety of this document in the form that it has been presented to me.

THE COURT: You object because it is not signed? Sustained.

Q Mr. Faunce, do you have any recollection of who was present at the meeting of May 21, 1969, the board of directors?

A Not that specific meeting, I couldn't recall.

THE COURT: What was the date of the meeting?

MR. SANTORA: May 21, 1969.

Q I show you Exhibit UUUU and ask you if your recollection is refreshed from the document, sir?

A Yes, it is.

Q Will you tell us based on your own recollection who was present at this meeting?

THE COURT: As refreshed by your examination of this document.

MR. FREDERICKS: Before he asks that one question, may I ask one question on the voir dire?

THE COURT: I think a voir dire would be inappropriate here. You want to ask it, go ahead, ask it.

VOIR DIRE EXAMINATION

BY MR. FREDERICKS:

Q Mr. Faunce, before you look at that document, do you have any idea who was at the meeting?

A Yes, I have an idea who was at the meeting because I know who was on the board and a quorum was there, but I didn't know who might be missing that day.

Q And the only reason you now know is by reading the list?

A That is correct.

MR. FREDERICKS: I have no further questions.

THE COURT: You were at the meeting?

THE WITNESS: Yes.

THE COURT: You knew who was there the day you were there?

THE WITNESS: Oh, yes.

THE COURT: The meeting happened six years ago?

THE WITNESS: Yes.

THE COURT: And since that time your memory has become vague as to who was there and who was not there?

THE WITNESS: Yes.

THE COURT: Now, having looked at that document, you have a refreshed recollection as to who was there?

THE WITNESS: Well, I know that Mr. Bloomingdale

would have been there, because he presided, and he presided at all the meetings during 1969. I have no specific recollection of anything any of the other people might have said at the meeting, but I recall Asch being there and I recall Kopp being there.

THE COURT: How do you spell that?

THE WITNESS: K-o-p-p. But I have no specific recollection of any of the other people.

BY MR. SANTORA:

Q Do you recall what happened at the meeting, Mr. Faunce? Do you have a recollection of that today?

THE COURT: First, do you have a recollection independent of looking at the document which is DDDD?

THE WITNESS: No, not of the May 21st meeting as opposed to June or April.

MR. SANTORA: I withdraw my offer at this time.

THE COURT: Anything else?

MR. SANTORA: No.

MR. FREDERICKS: Nothing further of this witness?

THE COURT: You are excused, Mr. Faunce. Thank you very much.

MR. SANTORA: Your Honor, the defendant is prepared to rest its case, with the exception of one item

we mentioned before that you would take under advisement and that is the best evidence, the Internal Revenue Service report that I had interrogated or asked Mr. Plug about.

THE COURT: Step forward, both of you at the side bar here. We will review that.

STANLEY J. FRIEDMAN, called as a witness by the plaintiffs, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. FREDERICKS:

Q Mr. Friedman, where do you reside?

A Riverdale, New York.

Q Are you an attorney?

A Yes, I am.

Q Are you admitted to practice in the State of New York?

A Yes, I am.

Q When were you so admitted?

A In December of 1951.

Q Would you tell me with whom you are presently associated and in what capacity?

A I am a member of the firm called Shereff, Friedman, Hoffman & Goodman, 919 Third Avenue in New York City.

Q How long have you been a partner of that firm, sir?

A Since July 1, 1971.

Q Prior to your becoming a member of the firm of Shereff, Friedman, Hoffman & Goodman were you connected

with any other law firm?

A Yes.

Q What firm was that?

A From September 1953 until June 30, 1971 I practiced with a firm called Berlack, Israel & Liberman now at 26 Broadway, and I was a partner of that firm for the period beginning January 1, 1960 through June 30, 1971.

Q Would you give us, please, your educational background?

A I graduated from Harvard College in 1948 and from the Yale Law School in 1951.

Q Are you a member of the Yale Law Journal?

A I wason the board of editors, yes.

Q Have you had any experience in the field of securities regulation?

A I have practiced in the field since I began to practice law.

Q How many years is that?

A Almost 22.

Q Would you state for us your experience briefly and generally in that field?

A I participated in the preparation of a great many registration statements. I have represented public companies, and I have worked in other areas of the

securities business, such as representing brokers, mutual funds, and investment advisors.

Q Have you ever lectured or published in the field of securities regulations?

A Yes, I have.

Q Would you give us a brief acquaintance with your accomplishments in that field?

A I have lectured since 1961 or 1962 for an organizatic called The Practicing Law Institute which provides programs for lawyers and others.

I have lectured in various programs sponsored by The Practicing Law Institute. The first time I did this was in 1962 when there was a program called Securities and Exchange Problems of controlling persons in underwritings, and I have since lectured for The Practicing Law Institute on 20 or 30 occasions, I would say, at least 20 of which involved the preparation of registration statements.

There is a program called How to Go Public, an introduction to the securities laws. We did that two times in 1974.

In 1972, under a slightly different name, the third annual How to Go Public Institute, we also did the program. We did it in 1971 and in 1970. I think I must have participated in that program 11 times. It changes

as there are developments in the field, and the purpose of doing it on a more or less annual basis is to keep it current.

In 1969 I ran a four-day program for the American Management Association on the responsibilities of public corporations, and I subsequently ran one, and I think in 1971 the American Management Association on disclosure problems.

In 1972 I participated in a program for the New York Law Journal, which also was in the midst of running programs, called Expanding Responsibilities under the securities laws, and there was another one of the New York Law Journal which dealt with hot issues and problems of companies filing for the first time.

Q Have you ever been called to testify as an expert witness in any federal or state courts?

A Yes. In 1970 I believe I testified in this court as an expert witness in a case called Republic Industries against Lionel Corporation.

Earlier this year I gave a pretrial deposition in a proceeding in Denver called United Telecommunications Corporation against American Television and Communications Corporation.

Q In the Denver proceeding did you give that deposition as an expert witness?

A Yes. I was called to give a deposition as an expert witness.

Q In what court was that matter?

A That was in the United States District Court in Denver.

MR. FREDERICKS: Your Honor, I believe at this time I would like to move this witness as being qualified to testify as an expert in the field of securities regulations.

MR. SANTORA: I have no objection.

THE COURT: Ladies and gentlemen, that means that this witness can be asked his opinion and he may testify to his openion. You are to give his opinion such weight as you deem appropriate. That may be a great deal of weight, it may be moderate weight, it may be little weight, or no weight at all. From this point on, as distinguished from what I called fact witnesses, this witness may give his opinion because he has been qualified as an expert.

Q Prior to your coming here to testify, have you had occasion to examine certain other documents that are involved in these proceedings?

A Yes, I have.

Q Do you recall what documents it was that you examined?

A Yes, I believe so.

pgbr 11 Friedman-direct

I examined, among others, the paragraph of the contract which obligates the Diners' Club to use its best efforts promptly to file a registration --

MR. SANTORA: I object to the characterization.

THE COURT: I think that's a fair statement. What did you examine before you came here?

THE WITNESS: I examined the acquisition agreement.

Q I show you what has been marked as Exhibit 5 in evidence. Is that the agreement?

A Yes.

THE COURT: Particularly, did you give particular attention to a certain portion of the agreement and, if so, to what portion?

A I gave particular attention to what appears to be designated Section 10.2 and entitled Registration beginning with page 37.

Q Did you have occasion to examine what has been marked in evidence as Exhibit 13?

A Exhibit 13 is a notice of annual meeting and it dated June 20, 1969. Yes, I had occasion to examine this document.

Q I show you Exhibit 31 and I ask you if you saw that

pgbr 12 Friedman-direct

document.

A This is designated the annual report of Diners' Club, Inc. for the year ended March 31, 1969. I did have occasion to examine that.

Q I show you Exhibit 38 and ask you if you had occasion to examine a copy of that document?

A Yes. This is dated April 16th. Here is a letter to Diners' Club signed by Mr. Marx. I did have occasion to examine it.

Q I show you what has been marked as Exhibit 39 and ask you if you had occasion to examine that.

A This is a letter from the Securities and Exchange Commission to Mr. Alfred Bloomingdale, dated October 16, 1969. I did examine this.

Q Exhibit 41.

A This is a document dated February 18, 1970, addressed to the Securities and Exchange Commission, signed Diners' Club by Mr. George Faunce III as president. I did look at this document.

Q Did you have occasion to examine Exhibit 33 and the attachment thereto?

A Yes. The letter is dated January 29, 1970. It is addressed to selling stockholders named in a registration statement, and it is signed by the law firm

of Kelly, Drye, attached to it is a letter dated January 16, 1970 addressed to Mr. Bloomingdale, Mr. Alfred S. Bloomingdale, and signed by Mr. William C. Woodbranch, chief in the division of corporate finance.

MR. SANTORA: I would like him to ask the witness what he saw rather than suggesting it.

THE COURT: You are leading him by all of this. It is a proper objection.

Q Do you recall seeing any other documents in addition to the ones I just had shown you ?

A Yes. I saw certain correspondence relating to -- some of the correspondence related to the request that certain individuals reimburse the Diners' Club for expenses incurred in connection with the registration statement. There were several pieces of correspondence beginning, with the request for reimbursement, and that I related to the contention that Mr. Marx and others have the opportunity to approve the expenses.

MR. SANTORA: I object unless the witness can identify something. He is characterizing documents that he has not identified.

THE COURT: That's why Mr. Fredericks was doing it the way he was doing it. You objected to it and I thought your objection was right, and now you are

on the horns of the other dilemma. Why don't we continue and let's get in the record the documents he saw, and that will be it.

In fact, Mr. Fredericks, if you want to hand him what you know you showed him, let him tick off what he saw and if he saw anything else he can say so.

MR. FREDERICKS: Your Honor, I think we have enough to begin, and if I want to go to any other correspondence we can go back at that time. I want to move along as quickly as I can.

BY MR. FREDERICKS:

Q Mr. Friedman, would you tell us, please, in your expert point of view, what Exhibit 28 is?

A The document that was handed to me is a letter dated April 16, 1969 and it is a request on the part of Mr. Marx addressed to Diners' Club, attention of Mr. Bloomingdale, the president, requesting that the Diners' Club register securities held by Mr. Marx under the Securities Act of 1933, and it cites the specific paragraph of the agreement as the basis upon which the request is made.

Q I ask you to look at Exhibits 30 and 31. Can you tell us, please, as an expert, when the financial statements of Diners' Club, Inc. for the fiscal year ended

March 31, 1969 had been completed and certified.

MR. SANTORA: I object to that.

THE COURT: Yes.

MR. FREDERICKS: What is the basis for the objection?

THE COURT: It is not a matter for opinion. It is a matter for actual fact and then you can build from that.

Q I am now going to read to you from Plaintiffs' Exhibit 31 in evidence, the report of the certified public accountants.

(Mr. Fredericks read from Plaintiffs' Exhibit 31 in evidence beginning with the words "We have examined the accompanying" to the words ending "for the years ended.")

THE COURT: Is there a date there?

MR. FREDERICKS: June 6, your Honor, 1969.

Q Mr. Friedman, based upon Exhibit 31, the date upon which the financials of Diners' Club for the year March 31, 1969 was certified by Touche, Ross, and in consideration of Exhibit 28, the demand for registration as of April 16, 1969, do you have a professional opinion as to when a registration statement should have been filed in compliance with the demand made in Exhibit 28?

A Yes, I do.

Q Would you give us that opinion, please?

A I believe that to fulfil the convenant in the circumstances the registration statement should have been filed approximately two weeks after June 6th of that year.

Q Would you tell the ladies and gentlemen of the jury the factors you considered in reaching that opinion?

A Yes.

The letter requesting registration was delivered on April 16th. The company had undertaken in its contract promptly to file upon receipt of the request --

MR. SANTORA: I object to that. He is characterizing.

THE COURT: Yes, he is, but I will let him. He says this is the basis for his opinion. I will let him testify. You can cross examine him.

A (Continuing) And the company would then use its best efforts to proceed. Ordinarily when one -- In my experience, when a request for registration is made and it is a request that has a basis in a contract, we assume that we would start to prepare the textual portion of the prospectus immediately. The registration statement can be said for this purpose to consist of two elements, a textual portion describing the company and its business and

financial statements which contain financial information. The financial statements can't be prepared until after the end of the particular period covered, and we have seen that the financial statements for the year ended March 31st were not ready until June 6th.

However, in the interim, the company would have been preparing the textual portion of the statements which should have been ready about June so that when that date came they would have financial statements and textual material, and then I would allow them two weeks to integrate the two together and to respond in the text to any questions that arose out of the financial statements.

Furthermore, this company is what is called a reporting company. It was under an obligation to make continuing reports of its activities to the Securities and Exchange Commission on forms which the Securities and ExchangeCommission prescribes for the purpose.

One of the form is called Form 10-K, which is an annual report that has to be prepared and submitted to the Securities and Exchange Commission within 90 days after the end of the fiscal year of the company.

If the company's fiscal year ended on March 31st, the 10-K report would have to be ready and filed with the Securities and Exchange Commission under the regulations

of the Commission not later than June 30th. This is an absolute requirement imposed by the regulations.

The company, therefore, would have been preparing the information in the 10-K report. The 10-K report requires information which is very much like the information that is required in the registration statement under the Securities Act which would be necessary to register the shares, which was the subject of Mr. Marx' letter.

Furthermore, the company sent out proxy statements at about this time and an annual report, that is, as soon as -- On June 6th, when it received the financial statements, it proceeded to send out a report to stockholders, and it proceeded to send out notice of a meeting to be held in July. To a significant extent the information contained in the proxy statement and the information contained in the report are information which would have to appear in the prospectus and, therefore, when you add the 10-K report to the Commission and the proxy statement, which is reviewed by the Commission, and report to stockholders which the company is preparing at the same time, there were people in the organization of the company working on the matters, compiling them, which would be included in the registration statement to be filed to register the shares. Therefore, the company has been working on this information at the

same time, and when June 6th comes around and they get the financial statements, they should be poised to complete the job within a relatively short time.

Two weeks is an assement which I would make. It could be shorter. I don't think it could be expected to be longer.

Q Mr. Friedman, I show you the registration statement filed by Diners' Club in connection with Mr. Marx' demand, which, I believe, is marked Exhibit 30.

I call your attention to the date of August 28, 1969 upon which that statement was filed. Do you have an opinion, a professional opinion, based upon the filing of that registration statement, as to whether or not Diners' Club, Inc. used their best efforts to promptly file this registration statement in compliance with the demand they received?

A I do have an opinion on that.

Q What is that opinion?

A That Diners' Club did not use its best efforts.

Q What is the basis of that opinion?

A I have stated that based on the considerations I just gave the registration statement could have been filed approximately by June 20th. August 28th is some two months later.

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I construe the term "best efforts" in the context of a covenant to register shares as the assumption on the part of the person who gives the covenant an absolute, unconditional responsibility, to set to work promptly and diligently to do everything that would have to be done to make the registration statement effective, so that in the normal course of events--

MR. SANTORA: I object. That's a legal conclusion.

THE COURT: He is giving his opinion. I will give him latitude and you can cross examine. It is his idea based on what he believes to be the situation as it existed. That's his opinion. The jury can accept it; they can reject it. You will have a chance to cross examine.

Q If I told you that the officer at Diners' Club who was responsible for preparing the business history to go into the registration statement stated that he did not begin that task until the end of July, would that in any way add or subtract to your opinion as to whether or not Diners' Club used their best efforts?

MR. SANTORA: I object.

THE COURT: I will let him give his opinion. "To add or subtract," is a pretty poor choice of language.

Q Would it affect or alter your opinion?

THE COURT: That's better.

A It would confirm my opinion and it would underscore my opinion that the company did not use its best efforts.

Q If I told you that during the period from April 16th through August the company was involved in sending out proxy material, sending out reports to shareholders, possibly one or two proxies, would that in any way affect your opinion as to the company's performance under its obligation to diligently and promptly file.

A As I stated it would confirm it because to a significant extent information that is require to compile the proxy, and information that the company chose to compile in its report to stockholders, and information again that it was obligated to file for the SEC, all are types of information that will be used in the representation of the registration statement, so that I would conclude the information was available.

Q What about the fact that the company may have used its resources to proceed in getting these other materials out that we have just mentioned?

A The company assumed by contract an obligation to respond and do things when asked. The fact that its people, or some of its people, might have been engaged in

other activities does not, in my judgment, constitute a legal excuse for not fulfilling the unconditional contractual obligation that it undertook.

MR. SANTORA: That's not an expert opinion. That's a legal conclusion and I move to strike it.

THE COURT: It is his opinion. The jury can accept or reject it.

Q Would the fact that sometime between April 16, 1969 and August 28, 1969 the parties, both the Diners' Club and the person who made the demand are exploring possible alternatives to the demand, would that affect your opinion as to whether or not Diners' Club in this case used their best efforts to promptly file this registration statement?

A No, because Diners' Club should have begun immediately when they received the request to do that which should be done; therefore, I don't see that it excuses performance.

Q Does the fact that the person who made the deman was discussing with Diners' Club a possible alternative to registration in your view affect the Diners' obligation to promptly file?

A No. In my judgment the fact that he was exploring alternatives does not constitute a waiver

of his right to have Diners' Club go forward.

Q You testified that you had seen some correspondence concerning the payment of fees in advance?

A Yes.

Q I show you Defendants' Exhibits PPP, QQQ, and VVV, and RRR. Have you seen those documents before?

A Yes, I have.

Q Do you have an opinion, sir, as to whether or not the hesitation of Mr. Marx to pay--

MR. SANTORA: I object.

THE COURT: Sustained.

MR. FREDERICKS: I am going to read from Defendants' Exhibit RRR, if I may, your Honor.

(Mr. Fredericks read from Defendants' Exhibit RRR in evidence beginning with, "Confirming our discussion this morning" to "in accordance with your understanding.")

Q Do you recall reading that letter?

A Yes.

Q Do you recall reading the other documents that have been shown to you?

A Yes, I do.

Q Do you also recall reading the contract and the provisions relating to the payment?

A Yes, I do.

Q In your opinion, sir, does anything in that correspondence and the provisions of the contract related to the prepayment of fees affect Diners' Club obligation to promptly file the registration statement in this case?

MR. SANTORA: I object.

THE COURT: Sustained.

MR. FREDERICKS: On that ground, your Honor.

THE COURT: The word "affect."

MR. SANTORA: "Affect," and also, I don't think that question is a question for a witness based on the reading of that letter.

THE COURT: We do have right now, as I read the new rules under which we have been functioning--

MR. SANTORA: It is quite broad.

MR. FREDERICKS: I have no objection. If he wants me to read it all, I will read it all. The witness has testified he read them himself. I don't see any purpose in my standing here and reading the letters.

MR. SANTORA: I would ask at least an objection as to form.

THE COURT: "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided

by the tryer of the fact."

I think the form, using that word "affect," made that question defective.

Rephrase it.

MR. FREDERICKS: May I ask the question be reread striking the word "affect"?

THE COURT: Try a new question.

BY MR. FREDERICKS:

Q After having reviewed the contract and the correspondence concerning the request for fees, do you have an opinion as to whether Diners' Club promptly filed the registration statement in this matter?

A I have an opinion, and, as I stated, it is that Diners' Club did not promptly file a registration statement.

Q Would you give the jury and the Court the benefit of the basis from which you reached that opinion?

A Apart from the factors which I have previously cited, that is all the other things that Diners' was doing at the same time, the date of these financials, and so on, I note that the letter asking Mr. Marx to bear half of the expense was dated July 15, 1969.

If this were done in accordance with my assessment of the way it should be done, the registration state-

ment would have been filed by approximately June 20th and therefore this question comes up very much after the fact.

That would seem to me to be one significant reason for it.

MR. FREDERICKS: Your Honor, we better mark this for identification. This is the document which the Court took judicial notice of. I want to ask him if he has seen it.

THE COURT: Mark it for identification if you are going to show it to him. That will be Plaintiffs' Exhibit 54.

(Plaintiffs' Exhibit 54 marked for identification.)

Q Mr. Friedman, as an expert and person working in the securities field, are you familiar with the publication entitled The Annual Report of the Securities and Exchange Commission?

A Yes.

Q Have you had occasion, from time to time, to examine the annual reports of that commission?

A Yes.

Q Would you identify the document marked Plaintiffs' Exhibit 54 for identification?

A This document says it is the 36 annual report

of the Securities and Exchange Commission. It says 1970, which is the period erding on June 30, 1970, which is the end of the Commission's fiscal year.

Q Have you had occasion to refer to that booklet from time to time?

A Yes.

Q If I advise you that this Court has taken judicial notice of the fact that in June of 1969 it took a period of 90 days for a registration statement to clear the Securities and Exchange Commission from the day of filing --

THE COURT: That's an average figure?

MR. FREDERICKS: That's right.

Q -- do you have an opinion as to when the registration statement, promptly filed in this case, should have been effective?

A If you tell me it is 70 days, which is the figure given by the Commission as to processing time, if we start with June 20th, which was the date I previously stated --

MR. SANTORA: I object to this. This has nothing to do with this man's expert testimony. He is being asked to calculate days based on a Securities and Exchange Commission book. There is nobody here from the Securities and Exchange Commission. I don't think he is qualified to do that any more than anybody can do this.

THE COURT: Anybody can add 70 days to that.

MR. FREDERICKS: To June 20th, I believe.

MR. SANTORA: My point is that he is not getting this witness' opinion. He has wandered --

THE COURT: He has asked for an opinion. He has not finished his question yet. Let's finish the question and then we will see if it is objectionable.

Start the question over.

MR. FREDERICKS: It was basically a foundation question, your Honor.

THE COURT: Go ahead.

BY MR. FREDERICKS:

Q Do you have an opinion when a promptly filed registration statement would have become effective with respect to the Securities and Exchange Commission?

A About the end of August of the year 1969.

Q Can you tell the ladies and gentlemen of the jury what the term "effective registration" means?

A You file a registration statement with the Securities and Exchange Commission and you provide in the form -- I will start again.

The Securities and Exchange Commission has certain forms governing the information that must be in the registration statement. There are various forms for various types of companies. Apparently the one that was appropriate for Diners' Club was form S-1, a general form.

You also know, as a securities lawyer, that in addition to providing the information requried in the form you look to certain other sources which will tellyou what information you will put in a statement. There are various guidelines and rules and so on.

You then put these in the document and you file it with the Securities and Exchange Commission which reviews the document to see whether you comply with the form or whether there is anything that comes to their attention that requires explanation or clarification.

Perhpas the document might be internally inconsistent and so on. This is called the processing of the registration statement.

If the Securities and Exchange Commission has comments, it will send them to you as counsel. It will say,"If you will qualify thus and such then it will be okay." The processing time ends when the Commission is satisfied that the registration statement contains all the information required by the forms and by the other rules and regulations so that at that time it contains all material facts necessary to an investigators decision as to what he is going to do with respect to the stock.

When that happens the Securities and Exchange Commission issues an order which says, "This registration

statement is effective." That means that you can sell the stock by means of the prospectus included in the registration statement.

My answer to the question is that 70 days is the period during which this might happen based upon the information contained in this report which tells you what the average or median time is in the period.

Q After it becomes effective it can be sold to the public at large?

A Yes. When it becomes effective and you have that knowledge you, the issuer, and whoever is helping to sell the stock, can go forward and distribute the stock or bonds to the public.

Q I ask you to look at Exhibit 30 in evidence, the S-1, which notes a filing date on August 28, 1969. Assume, sir, that this registration statement did not become effective within 70 days of the date of filing. Do you have any opinion, based upon that and the documents you reviewed, as to whether or not Diners' Club used its best efforts to cause this registration statement to become effective?

A It is my opinion that Diners' Club did not use its best efforts to cause the registration statement to become effective. The most significant reason is that

it didn't become effective.

Q Did you review the opinion letters that the Securities and Exchange Commission issued in this case?

A Not opinion letters.

Q Comment letters.

A I briefly looked at the comment letters, yes.

Q You reviewed those before you came here today?

A Yes. I looked at the letter of comment from the Commission generally to see what kind of problems there were with the registration statement.

MR. SANTORA: May I ask the witness to identify the exhibit?

THE WITNESS: I am looking at Exhibit No. 39, which is what is called a letter of comment from the Securities and Exchange Commission.

As I said before, the Commission looks at the registration statement and it issues its comments. Then counsel tries to comply with them.

This letter which I have in my hand purports to be a copy of the letter from the staff of the Securities and Exchange Commission with comments.

Q Do you have an opinion, sir, as to when the stock which was the subject of Mr. Marx's letter on April 16, 1969 would it become available to sell to the

public at learge pursuant to an effective registration statement had Diners' Club promptly filed and used their best efforts to make the registration statement effective in this case?

A Yes, I do.

For all of the reasons I have stated, it would be about 70 days after June 20th, which, I believe, is the end of August, 1969.

MR. FREDERICKS: I have no further questions of this witness.

You may examine.

THE COURT: Mr. Santora, please step up here for a moment.

Off the record.

(Discussion off the record.)

CROSS EXAMINATION

BY MR. SANTORA:

Q Mr. Friedman, you mentioend before you looked at some correspondence concerning about requests for fees.

Do you know what I am talking about?

A Reimbursement of expenses, yes.

Q "Requests for fees" I think you called it?

A I may have.

Q Show me the first letter you got which talks about reimbursement and requests for fees.

A Just a moment. I believe the first one is Defendants' Exhibit PPP(e), dated July 15, 1969.

Do you have any letters earlier than that that talk about fees and payment of fees?

MR. FREDERICKS: Your Honor, Mr. Santora objected to my question. I asked him what he looked at. All the witness has in front of him are the documents I have presented to him. I object to the form of Mr. Santora's question.

THE COURT: Rephrase your question.

Q Did Mr. Fredericks show you any letter of an earlier date that referred to fees, fees paid by the people asking to register the stock? Do you recall anything like that?

A No, I have the contract which refers to fees which, of course, is earlier.

Q You think that the company was asking the person demanding the registration to reimburse them for fees?

A My understanding is that the company was trying to work out something interms of the provisions of the purchase contract which, in my professional opinion, is not very well drafted and presents problems which gave

rise to a controversy in that matter. I would like to read the language.

THE COURT: I am going to excuse the jury. They have been so patient. But it is going on 1:30 now. I say that with no attempt to inhibit counsel, but I will discuss with you the times for summation after I have excused the jury, because I did want them to get out of here at a reasonable hour this afternoon.

Ladies and gentlemen, I'm going to excuse the jury now at 1:30. I ask you if you can return at 2:45. Please enjoy your late lunch. Do not discuss the case amongst yourselves nor remain in the presence of any person who may be discussing the case. Keep an open mind on all facets of the case until it has been concluded.

The jury is excused and is directed to return in one hour and 15 minutes. I am mindful that this is the eve of a holiday weekend, and I will do my best to work with you all this afternoon. The jury is excused, thank you.

(Jury excused.)

THE COURT: Mr. Reporter, will you see who those people are in the ante-room next to the jury room?

THE COURT REPORTER: Judge, they are people here for your next case.

THE COURT: Thank you.

The witness may stand down.

mmjp 2

Gentlemen, we will recess now. You are directed to return in one hour. I intend to sit no later than 5:00 this afternoon. By that time I would hope that we will complete the cross examination of this witness, I will hear motions, and we will proceed with both of the summations.

How long do you expect to require for closing arguments?

MR. SANTORA: I thought we discussed an hour yesterday. I thought you had said an hour.

THE COURT: Well, it will be if we can start with the summations at 3:00. Counsel are directed to return at 2:30.

(Luncheon recess taken.)

AFTERNOON SESSION

3:00 p.m.

(In open court; jury present.)

THE COURT: Good afternoon, ladies and gentlemen. I am going to resume now. I consider that I have a commitment to the jury relative to your leaving this afternoon. I intend to honor that commitment. We will proceed now with the cross examination of Mr. Friedman, which was underway when we recessed for a very late lunch at 1:30. I appreciate the jury's indulgence this morning and again this afternoon.

S T A N L E Y J. F R I E D M A N, resumed.

THE COURT: You may proceed, Mr. Santora.

CROSS EXAMINATION (Continued)

BY MR. SANTORA:

Q You testified on your direct examination about the time for filing form 10-K and the proxy material and the S-1 forms.

Do you recall that, sir?

A I did not testify about the time for filing. I said that the company would have to file. When you say the time for filing, do you mean the time after the fiscal year within which the company must file a 10-K?

Is that what you are asking me?

Q Yes, sir.

A 90 days after the end of the fiscal year.

Q When you say 90 days, what is your source for that statement?

A There is a form called Form 10-K. It is a form put out by the Securities and Exchange Commission to advise companies which are subject to the requirements of filing these reports as to the content of the form and various other matters. The 10-K is to be filed within 90 days after the end of the coproration's fiscal year.

Q Is that the present rule?

A I believe that it is, yes.

Q Was that the rule in 1969?

A I believe that it was, yes.

Q Do you know if the rule changed in 1971?

A Well, I know that the rules applicable to 10-K have been changed in many respects in the last several years to include more and more information. As to the filing requirement, I believe it was 90 days and it is still 90 days.

Q Are you sure it was not 120 days in '69?

A It may have been, but I don't believe it was.

Q Is there any doubt in your mind about it?

A Is there any doubt about it? Whenever I file any report it is high time to review the time within which it must be filed.

Q When did you agree to testify in this case?

A About three weeks ago.

Q Who contacted you?

A Mr. Fredericks.

Q When did you decide or when did you conclude that the Diners' Club had failed to file the registration statement promptly?

A When Mr. Fredericks described the case to me and the circumstances with particular reference to the time the request was made, the provisions of the contract, and the time that the registration statement was filed, which was close to the beginning.

Q How did he describe it to you? Was it a meeting? On the telephone?

A He called me up. He said he understood that I had credentials as an expert.

Q What did you say?

A I said that was very flattering. I said to him, "What kind of a case is it? I am not a professional expert witness, so I would like to be sure it is a matter within my competence."

He described the matter. He knew that I had testified as an expert witness in a case involving the construction of similar language in this court. He had a copy of my transcript which he had read, and he said that he though that this was comparable, and after discussing it with him I agreed with him.

Q How long had you been discussing it with him on the phone when you agreed with him?

A How long? I can't recall. Of course, I said to him in the conversation, "I would like to look at the documents," because my initial impression should be verified by a review of documents. But my initial impression was that the company had not satisfied its best efforts obligation, and after reviewing the documents that were presented to me I was concerned in that.

Q You were concerned that they did not file it promptly?

A I was concerned in my impression that they had not honored a contractual commitment in the document that was presented to me.

Q Answer my question. Were you in agreement they didn't file promptly?

A That they didn't file promptly after request, certainly.

Q They did not use their best efforts to get it effective after they filed?

A I was concerned in my view that they had not used their best efforts in the sense that their contractual obligation required them to use their best efforts in the sense that I understood it as a practicing securities lawyer.

Q You felt they were bound to the exact language of the contract? Is that what you are saying?

A I felt they were bound to proceed diligently and promptly and that they had not.

Q When is the first time you saw any documents in this case, Mr. Friedman?

A A week and a half to two weeks ago.

Q And in between the time you had your first conversation with Mr. Fredericks did you have any subsequent telephone conversations?

A I had one or two to try to discuss this with him further. I had other legal matters to attend to, as you can imagine.

Q Do you know what documents you saw for the first time?

A Do I know what documents I saw?

Q Yes.

A I can identify some of them, yes. I received the purchase contract, which I mentioned this morning; I received Mr. Marx' letter of April 16th requesting the registration; I saw the annual 1969 report of Diners'; I saw the proxy statement dated June 20th; I saw the registration statement; I saw a letter of comment on the registration statement; I saw the other documents that were referred to this morning, including the letter from Mr. Woodward, which was attached to a letter withdrawing the registration statement in February, I believe. I saw correspondence relating to the advance payment of the moneys pursuant to the provision obligating the people requesting the registration to reimburse the company. I saw the subsequent letter from the company which, in effect, reduced the amount it asked from $70,000 to $50,000 or so. I saw correspondence with respect to indemnity; I also saw a document which may or may not have been introduced in evidence, but if you are asking, it was a tender offer from Continental Corporation early in 1970.

Q How long did you spend reviewing documents for the preparation for your testimony today?

A Oh, something like 10 to 15 hours.

Q When was that time spent?

A When?

Q Yes.

A In the last two weeks.

Q Did you also have some conversations with Mr. Fredericks?

A Certainly.

Q Did you do any research?

A Did I do any research?

Q Yes.

A I have had the benefit in my approach to this in having spent a great deal more time earlier this year on the matter of what the words "best efforts" mean because I was an expert witness in a trial in Denver, and I did substantially greater preparation for that. I think that was a harder case, as a matter of fact, but I did this year spend a great deal of time on this particular question before that.

If you want me to quantify the time, I must have spent 50 hours on the Denver matter. So "best efforts" has engaged my time quite a bit this year.

Q You say best efforts were not complied with because the document was filed August 28th and it did not become effective in 60 days?

A I am saying that the company did not honor its obligation to use its best efforts for a variety of reasons.

It did not set out on April 16th when it got the request. Another, it did not file by June 20th, which I conceive to be the earliest possible time that it could have filed under the circumstances.

The third reason is the fact that between the 20th of June and the time it did file, another two months elapsed.

And, finally, I understand that the company did not even begin to work on the historical part of the prospectus until some time toward the end of July or August.

So I have a good many reasons for saying so. Furthermore, the registration statement never became effective, and it is my opinion that the best efforts obligation requires you to pursue the registration statement unless there is cause beyond your control. And the documents I saw is no cause sufficient to excuse them. Those are my four major reasons.

Q Are you through with that answer?

A I could try longer if you want me to.

Q Howdo you know what they did after April 16th?

A I am judging by the status of the documents I have seen that were filed with the Commission, and the initial filing was some time in August.

Q What did they do to delay?

A What did they do to delay? Nothing. Delay consists of not meeting a deadline. They did not meet the deadline, which I conceived they would have been obligated to meet, which was June 20th.

Q I show you Exhibit 28, Mr. Marx' letter of April 16th, 1969. Do you see the last paragraph?

A "In connection with the" --

Q I ask you to read it to yourself.

A I am sorry. Okay.

Q Is that what you are talking about, the request for reimbursement of fees?

A No, I am not talking about that. Would you like me to say what this says?

Q Yes.

A This is the the letter of April 16, 1969, by Mr. Marx in which he requests registration. The last paragraph says: "In connection with such registration the undersigned is prepared and offers to advance to you an amount sufficient to reimburse you one-half of all registration fees and expenses as provided in said paragraph 10.2(b) and to furnish an indemnity agreement therein."

Q Did you look at that part of the agreement, 10.2(b)?

A Yes.

Q Do you see that the person requesting registration is obligated to advance payment for the registration, the filing fees?

MR. FREDERICKS: I am going to object to that question. The document speaks for itself as to what it provides.

THE COURT: Let me hear the question.

(Question read.)

THE COURT: Answer the question to the best of your ability.

THE WITNESS: I believe that question that I had not answered was this in some way related to the contract. He asked it more precisely, but was this related to the contractual provision dealing with the reimbursement of expenses.

Is that fair?

Q Yes, I am talking about the word "advance" as related to expenses.

A Yes.

Q Do you see the word "advance"?

A Yes.

Q Does that mean to you you have read this contract to form your opinions for the questions that Mr. Fredericks asked you?

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A Yes.

Q And you have read the rest of paragraph 10-2(b)?

A Yes.

Q Did you see where it said, "The notifying holders shall pay Diners' in advance an amount sufficient to reimburse Diners' for one-half of all registration fees," and it talks about some other costs?

A Yes, I do.

Q Now, in your opinion as an expert, Mr. Friedman, does that signify to you that the holders, the requesting holders had to tender an advance payment before Diners' was obligated to file a registration statement?

A I have two answers to that question.

Q Let's try one.

THE COURT: Give them both.

THE WITNESS: As I started to say before lunch, the provision in the contract is a contract that is impossible of fulfillment. I consider the contractto be badly drawn in that it says people have to pay in advance expenses which in their nature cannot be determined until a later date. Thus, a person cannot pay half of legal fees when we do not know what the legal fees will be, and, of course, we can't know what the legal fees will be until the job is finished.

THE COURT: It is your construction that the cause of the impossibility to determine what it would be there was no contract?

THE WITNESS: No, I am saying that this is a contract which has to be interpreted in such a way as to carry out the intent. Mr. Marx did the best he could. He said he would pay in advance. Then the question came up in this document, how does one determine to pay in advance when one does not know. One makes an estimate. Mr. Marx received an estimate which is in the correspondence I saw this morning. Mr. Marx then did what I consider to be prudent. "On what basis" he said, "do you get that estimate?"

An estimate was furnished, and after an exchange, the extent of which I am not sure of, the estimate was reduced from $70,000 to $50,000, and this was in July. At this point there was agreement as to what portion of the expenses would be paid. Mr. Marx also insisted on the right to approve the vouchers, which was resisted somewhat, and they finally reached some sort of a conclusion where he would be shown the vouchers and he would have the opportunity to speak up, and it was not clear whether if he disagreed with the item shown there he would have any recourse.

It was a very fancy discussion intended in part to deal with the problem caused by what I conceive to be faulty draftsmanship at the time the contract was made.

THE COURT: In other words, it is your testimony that the acquisition agreement of October 10th, 1967, which is Plaintiffs' Exhibit 5, which was entered into between the Diners' Club and Fugazy Travel Bureau, Inc., was faultily drawn, at least insofar as paragraph 10.2(b) is concerned?

THE WITNESS: Yes. I would not want to characterize the whole agreement in that way, but on analysis, that is a very difficult thing to carry out, given the fact you don't know at the time you have to put up the money what the amount is.

Therefore, I would assume that one would attempt to approximate, work out some arrangement in good faith, and that seems to me what the documents that I have read show.

THE COURT: In other words, you are saying that the parties when they disagreed on a paragraph that was badly drawn in the first place, tried to reach an accommodation between themselves? Is that your testimony?

THE WITNESS: With respect to this item. I have previously stated that this did not come into issue until

some time in July, and I have no reason, nothing which I could base any idea as to why one waited until July, why it took until July for this particular problem to surface, especially in the face of Mr. Marx's willingness as expressed in his letter of April 16th to do something.

THE COURT: You don't add any time to the effective date of the registration due to this disagreement between the parties, as w understand it?

THE WITNESS: Yes, I do not add any time to the period I contemplate, correct.

Q If you were handling a registration statement for one of your clients, would you have to give him any estimates, such as for the printing costs?

A I typically take competitive bids, because it is well for him to know how much the cost is. That is why I take estimates.

Q YOu send estimates to the requesting holders of stock on behalf of your cleint?

A If there were a situation in which somebody had to have an estimate of what it would cost, I would certainly send him an estimate.

Q You have never done that before?

A People always know what it would cost. You put the question in a particular way. People always want

to know what a registration would cost. I tell them. But this is something different from putting up money in advance.

Q Did you see anything in the contract which gives Mr. Marx a right to approve the amount spent on the registration?

A Yes, I do. I believe the question was, do I see anything in the contract that would give Mr. Marx a right to approve fees. The contract says he shall pay. The contract as to which I have already expressed my view says that the notifying holders shall pay Diners' in advance in amount sufficient to reimburse Diners' for one-half of all registration fees, printing costs, auditing fees, but only in excess of normal fees paid by Diners' for its fiscal year end audit, legal fees and all other incidental out-of-pocket expenses incurred in connection with such registration statement.

I don't think that it is unreasonable for Mr. Marx to know what he is paying for.

Q Have you spoken to Mr. Marx himself about this, as opposed to Mr. Fredericks?

A Not Mr. Marx.

Q Have you spoken to Mr. Marx?

A Have I spoken to Mr. Marx? No, I have not

spoken to Mr. Marx about this.

Q How do you know what Mr. Marx was thinking and what he was doing in this period of April and May, Mr. Friedman?

A I don't know. I believe you have asked me to speculate. I am only looking at the documents.

Q What does "in advance" mean to you? In advance of what? The money is to be paid in advance of what?

A It could be construed in advance of the fun, right. That is correct. On the other hand it can also be construed in English, and since it is impossible to know, I have to interpret the language to make sense, and, therefore, I get a question as to how you know what the word means.

MR. FREDERICKS: In keeping with the Court's policy of permitting counsel to read the full language, and since everybody is reading, I would like to read the rest of that language, if I might.

THE COURT: You will have an opportunity on redirect. I am going to give you the opportunity. I think it is properly direct, and I am going to permit you.

Q Now, Mr. Friedman, is it your opinion from this contract, are you telling us it is your opinion that Mr. Marx was not required to advance that half payment in advance of the filing before Diners was obligated to file the registration statement?

A I think that my testimony is that Mr. Marx behaved in a reasonable way and if there was a controversy over the amount, it was Diners that was behaving unreasonably, rather than Mr. Marx From Day 1 Mr. Marx apparently indicated

his willingness to do something, notwithstanding the difficulty of interpretation of the contract, and I believed he behaved perfectly reasonable, and, indeed -- well, never mind --

MR. SANTORA: I move to strike it because it is not responsive to the question.

THE COURT: Strike it.

Q What is the source of your information that what Mr. Marx did or didn't do?

A The correspondence that was shown to me.

Q Other than your correspondence, is there any other source that you had to derive as to what Mr. Marx thought was reasonable as to what he was doing at that time?

A Yes.

Q What is that?

A The contract that I have seen, my experience in the interpretation of contracts, and I would like to think my experience and use of the English language.

Q Now, when you talked about July and the money not being paid yet, I assume you are referring to Exhibit PPP, July 15, Mr. Faunce's letter, where he is asking Mr. Marx to pay the money.

A I have to assume from this letter that no money was paid prior to July 15. I also have to assume that there was

no one asking Mr. Marx to live up to the commitment that he made in the April 16 letter before that date. I think the failure to ask is inconsistent with a desire to use one's best efforts to get the show on the road and get this stock registered.

Q What do you have to assume that it was not asked? Is there anything or any document that you have seen so far to suggest to you that he was not asked?

A Yes, because of what this correspondence indicates to me is that Mr. Marx was a very careful man who puts in writing things which other people do not, and I am impressed with the documentation here. If there is a luncheon conference, Mr. Marx would sit and write a memorandum. I find an impression here that Mr. Marx is a man who puts things in writing.

Q It is your testimony then that Mr. Marx' failure to pay by July 15 still obligated Diners to go ahead and register the stock?

A It is my testimony this money that by July 15 the registration statement should have long since been filed, indeed, by June 20. Yes, it is my testimony that -- to rephrase your question -- it is my testimony that the existence of this letter on July 15 is irrelevant to the question of whether the company used its best efforts as it

is required to do, and it does not change my view that the company did not.

Q You know Mr. Marx is a careful man because he puts everything down on paper? Take a look at that VVV.

A I am looking at a letter from Mr. Otto Marx dated August 22, 1969, to Mr. Julian Weber, to the law firm that prepared the registration statement. May I read this?

Q You may read it to yourself.

A Okay.

Q Will you look at Exhibit R?

A Okay.

Q Now, Exhibit VVV has mention of an indemnification. Do you see that?

A Yes.

Q I want to read you the last paragraph of this letter -- I will read you the whole letter. Mr. Marx says:

"Dear Julian:

"In reference to your letter of August 22 relative to the registration of Diners' Club stock, if you decide to file the registration statement without having the company, i.e., Diners' Club, indemnify us against all material which they have represented in the registration statement, I wish to go on record at this point that we feel no obligation

to compensate you or your company for any of the expenses involved. We are not authorizing you to file any registration without proper indemnification."

Does that change your testimony at all as to whether or not they should have filed before August 23?

A No.

Q It does not change it at all?

A No.

Q If the person requesting the registration tells the company that he wants them to stop the registration, is the company still obliged to go forward?

A I don't believe that that is what happened here.

Q I am asking you that question as an expert. Can you answer that for me?

A Will you repeat the question?

Q Once the request is made, must the company register the stock under any circumstances?

A To respond to your question, unless the person who has put in the request specifically removes the request.

THE COURT: Or withdraws it.

THE WITNESS: Or withdraws it, yes, sir. I can amplify the answer if I may.

THE COURT: It is up to counsel if he wishes you to proceed.

I assume from the lack of response you prefer to go to the next question?

MR. SANTORA: Yes.

Q I show you a document, MMM in evidence. I ask you if you saw that letter when you were preparing for your testimony today.

A Yes, I did. It is a letter dated May 19, 1969, to Mr. George Faunce, and it is not signed, but it does space for the signature of Mr. Otto Marx, Jr.

Q Is that the letter you were referring to before when you said that Mr. Marx was exploring an alternative?

A I don't believe I used that phrase at any time.

Q Maybe your counsel did. Was he pursuing an alternative? Explain an alternative?

MR. FREDERICKS: I object to the form of the question.

MR. SANTORA: Withdrawn.

THE COURT: It is withdrawn. Next question.

Q Do you remember saying before that even if the holder of the stock is pursuing an alternative to registration that still is no excuse for the company not filing the registration statement?

MR. FREDERICKS: I object to the form.

THE COURT: Do you recall saying that?

THE WITNESS: I don't recall saying that.

THE COURT: Next question.

Q Do you see the fifth paragraph where Mr. Marx is suggesting an alternate plan?

MR. FREDERICKS: Your Honor, I am going to object to that characterization of a document in evidence.

MR. SANTORA: I will read the first paragraph, reading from MMM:

"As I am going to Europe on Wednesday, the 21st of May, for a couple of weeks, I thought I would summarize our discussions at lunch last week relating to an alternate plan so that the Marx-Fugazy block of Diners' Club shares would not have to be registered at this time."

Q Do you see that?

A Yes.

Q Now, on May 16, was Mr. Marx making this suggestion?

MR. FREDERICKS: I object, your Honor. Mr. Marx is not making any suggestion.

Q On the date of this letter, Mr. Friedman, is it your testimony that Diners was obligated to go ahead with the registration?

A Certainly. This talks about an alternative way of presumably handling Mr. Marx' stock and/or the financial

situation as discussed in the letter. I do not think that it excuses the company from going forward, because this is still very much in the realm of proposals. Nobody has agreed to anything. The company has not said it will help Mr. Marx and Mr. Marx has not said that he will relieve the company of its obligation. This is just interesting talk, but it does not constitute any kind of a waiver or amendment of any obligation of anybody.

Q Registration is a fairly expensive process, is it not?

A Yes.

Q One could cost forty, fifty thousand dollars?

A Yes.

Q Would you tell a client of yours as an expert in this field to go ahead with a registration statement while he is negotiating an alternate plan with the holders of the stock?

A If I represented a client who had signed a contract which obligates him to go forward with a registration statement upon the request of somebody and the request is made, I would certainly tell him to proceed competently and diligently. If there are alternatives or if the client was concerned about the cost, I would insist that the client and the person he was dealing with have an exchange of

correspondence suspending the passage of time or recognizing that my client was temporarily let off or that time was tolling, because I would not want an expert sitting where I am to say that my client had failed to do what he is supposed to do. That is to say, I regard nothing in this as expressing any agreement by Mr. Marx with any waiver or failure of Diners' Club to do what it contractually committed itself to do.

Q Will you look at the rest of that letter and see if you can find such comment in there, Mr. Friedman?

(Pause.)

Q (Continuing) Do you see anything in that letter, Mr. Friedman, that talks of the kind of letter you wanted?

MR. FREDERICKS: I am going to object to the form of the question.

THE COURT: Sustained.

MR. FREDERICKS: Your Honor, I think there was a pending question as to which the witness was to look at the document.

THE COURT: I will consider it withdrawn.

MR. SANTORA: I wanted to read the P.S. on this letter.

"I am sure this plan would eliminate the cost of the registration statement and the disclosure of a great

deal of complicated information."

Q Does anything in that letter change your mind at all that Diners' was obligated to go ahead and register as of May, 1969?

A The language which you read indicates that Mr. Marx is well aware that the company would naturally want to pay the money, and he is trying to get leverage, to get a good deal, but he does not agree to the suspension of the company's obligation.

Q It does not state that he has paid the money?

A It does not indicate that he has paid the money.

Q Did you see this letter of June 12, 1969, which is Defendant's MMM? It refers to a trip by Mr. Marx. Do you think that Diners was required to go forward while Mr. Marx was out of the country on the registration, Mr. Friedman?

A Certainly. Mr. Marx is not preparing the registration; it is the company's registration statement.

Q Was there anything that Mr. Marx was required to do besides paying the money?

A There were two conditions which Mr. Marx would have been obligated to meet: one was the one that you have asked me about, which is the question of the advance payment of the fees; the other one is the indemnification question in the agreement. Is that what you are referring to?

Q Is that Exhibit SSS?

A It is a letter from Mr. Otto Marx from Mr. Walker on the letterhead of Diners'/Fugazy Travel, dated August 21, 1969.

Q That is right?

A Okay. In registration statement work there is a question of legal liability for the statements and the registration. I said this morning that when the registration came effective it had to have all the material facts. I did not say, but will say now that Mr. Marx as a seller would be responsible for all the contents of the registration statement. Similarly, Diners would be responsible for all of the contents of the registration statement.

One of the things the registration statement would have to disclose is the plan by which Mr. Marx as the selling stockholder would sell the stock. That information furnished by him would be information in his head, and the question would be how to protect Diners if Mr. Marx gave false information which was included in the registration statement for which Diners was responsible. It, naturally, wished to have an indemnification. Mr. Marx on his side, who is less connected with the company, wanted to have somebody protect him if there were any misstatements in the body of information furnished by the company. The

purchase agreement which we had been discussing contemplates this routine situation by providing for provisions for indemnification. He will indemnify the company if they sustain a loss if he told them the wrong thing, and they would protect him in the other situation should that occur. There was a dispute here about the form of the indemnification. If I recall, this talks about an indemnification in conventional form. I may be wrong on that. What is an indemnification in conventional form, alas, it is something over which lawyers disagree. There was disagreement in this case as to the extent and nature of the indemnification, and as the correspondence indicates, people got mad at each other around about August. He said he would not pay if they did not indemnify him. And there was part of what appears from the documents to be increasing acrimony about the way things were going. This document, I think -- well, it should be read.

Q Why don't you?

A "I spoke to Larry List today --"

THE COURT: You are reading from which document?

THE WITNESS: SSS, the letter I referred to of August 21, 1969:

"Dear Mr. Marx:

"I spoke to Larry List today regarding the

indemnification provision contained in Paragraph 6 on the form submitted to you for your signature. Mr. List agreed to forward for consideration our position to the effect that the indemnification is too broad and indefinite. and further that we want the paragraph eliminated.

"If it is deemed necessary that this paragraph be incorporated, I think, with some editing of the language, we could narrow the scope of the indemnification considerably.

"Please advise me if there are any further developments."

So this indicates to me that there was initial over the extent to which people should be indemnifying each other, and that appears to have been on the way to resolution by that date.

Q Does it also appear to you that Mr. Marx had not provided indemnification by August 21, 1969?

A It certainly does appear that way.

Q Is it your testimony that Diners was required to file a registration statement without an indemnity from Mr. Marx?

A The question that you are asking me is whether Diners had legally sufficient reasonto refrain from fulfilling

its obligation, and as I previously stated I think it should have had fulfilled its obligation by June 20, and I cannot understand why these questions got raised at these later dates.

Q Do you know why the indemnification was not signed?

A Ultimately one was signed.

Q Let us say by August 31. You seem to know what is going on in these letters.

MR. FREDERICKS: I move to strike.

THE COURT: Sustained as to form. That last remark should be disregarded by the jury.

Q Do you know why Mr. Mark had not provided them with indemnification by August 21?

A This letter tells me there was not an agreement on the form of the indemnitifcation, the form not having been specifically provided for in the original document. Yes, they could not agree on the form.

Q Have you had a client ask your advice about receiving indemnification from sellers in the registration statement that they were trying to file?

A Certainly.

Q And have you ever advised the client to file the registration statement without getting an indemnification

from the sellers?

A It would depend on the people with whom I am dealing. Yes, I have.

Q Is it your normal practice to tell your client to file without an indemnification?

A In most cases it would be my practice, yes.

Q In most cases.

THE COURT: To do what?

THE WITNESS: To tell my client to go forward, to file the registration statement even though certain documents which would ordinarily be dated as of an earlier date had not yet been completed, yes. In the registration business large amounts of money are committed, and in a typical statement a vast amount of work is done before the issue can be sold.

THE COURT: In your opinion would it be unreasonable for someone in the position of Diners' Club to request that the indemnification agreement be signed before the registration statement was filed?

THE WITNESS: In my opinion it would not be unreasonable for them to make such a request.

Q Did you ever have any discussion or did you ever see in any of these documents any discussion between Mr. Marx and Diners' Club about Mr. Marx deciding whether

to withdraw the request for registration?

A Except insofar as the letter you asked me about earlier in which there is an alternative plan, I do not believe I did see anything. Well, at the end I believe I did see a letter from Mr. Marx after the company had withdrawn it. Mr. Marx insisted that it be reinstated.

Is that responsive?

Q Do you know what letter that was?

A I believe in February the company withdrew, February, 1970, the company withdrew its registration because of the tender offer by the Continental Corporation, and Mr. Marx wrote a letter about that time, the date of which I do not recall, in which he said he did not believe it was proper for the company to withdraw the registration, and he insisted in the letter that it be reinstated. This was after the indemnification language had been agreed to and a commitment had been made with respect to expenses.

Q One last question on the indemnification. Mr. Friedman, you say that the indemnification agreement was not signed by August 21. Does it remain your testimony that the failure to file before August 28 was a failure to promptly file by Diners?

A Yes.

(Continued on Page 1782)

Q Please look at Exhibit MMMM.

A (Pause.) All right, I have seen this.

Q Did anyone tell you Mr. Marx had a discussion with Diners about agreeing withdraw the registration statement before today?

A I may have seen this letter but I don't believe so.

MR. SANTORA: I am reading from Exhibit MMMM in evidence.

(Mr. Santora read from Defendant's Exhibit MMMM in evidence from "Dear Otto" to "as previously agreed.)

Q Is there anything in that letter that would change your testimony as to whether Diners' failed to use its best efforts to get the registration statement made effective?

A The first thing that strikes me is the date on this letter as opposed to the period within which I think it should have completed the registration statement. This does not change my opinion at all.

Q In other words, as far as you are concerned, however, they may be negotiating for the withdrawal of the statement you think that Diners should have gone ahead and spent the money and registered the stock anyway?

A This negotiation should not have taken place at this time. I would say that I get a sense that Diners' really didn't want to register, and I see a good deal of

reasons.

Q What makes you think that Mr. Marx didn't want to register the stock?

A That's not what I said.

Q What makes you think that it was not Mr. Marx who was trying to slow down the registration?

A Well, Mr. Marx made a request for registration at one end. At the other end he objected vigorously to the withdrawal of the registration, and it does not seem to me anywhere in between was there any satisfactory alternative presented to him.

It would appear from the examination of documents to be Mr. Marx's position he was in pretty good shape. He had an obligation which Diners would just as soon not have undergone for expense and other reasons, and he is perfectly delighted to listen to Diners try to figure out a way to avoid the expense. I think at all times he would have liked an alternative means knowing he had a commitment, unconditional, to use best efforts to register.

Q Do you know of anyone else who had in his pocket an obligation to pay the expenses?

A I believe that by November that question had been resolved.

Q When you look at Defendants' Exhibit MMM, do you

see Mr. Marx suggesting an alternative plan to registration?

MR. FREDERICKS: I object to that question. Mr. Santora has characterized that erroneously.

THE COURT: If I can see it I can determine for myself.

Let me hear the question read.

(Record read.)

THE COURT: I don't find that an unfair characterization.

Since you have objected so strenuously I will have counsel read the first paragraph of the letter and then you can ask your question.

(Mr. Santora read from Defendant's Exhibit MMM from "Dear George" to "to be registered at this time.")

Q Is there anything in that letter that indicates to you that Mr. Marx was not anxious to discuss some alternative plan to register the stock?

MR. FREDERICKS: We have asked and answered this twice. We have read the letter, the paragraph, to the jury twice. We have gotten an answer twice. I think on cross-examination we have exhausted this area.

THE COURT: Overruled.

A I don't regard this letter as determinative of Mr. Marx's position because it seems to me to be equally

consistent with this letter to assume that Diners didn't want to proceed to register a position that I have, a position I have reached on the basis of all the documents I have seen, and they are saying to Mr. Marx, "What would it take to persuade you to forego the rights you have in that contract?" And this letter says, "Under certain conditions which seem to me to be very nice I will be glad to let you off the hook." That is your critical obligation.

THE COURT: So we can both save money; is that right?

THE WITNESS: Yes, among other things he can have money in hand quickly and they don't have to go through the expense or the aggravation or a disruption of the registration statement.

Q When you file the registration statement what happens next?

A After you do that, as I said this morning --

Well, the Securities and Exchange Commission processes it. To cut the other procedural steps, it goes to a person at the Securities and Exchange Commission who is a member of the staff, and that person -- which was done generally in rotation -- if the company is a company that is already on file with the Commission, as this was, because of its earlier registration, it might already have a liaison

person at the Securities and Exchange Commission who has been looking at the reports. But, in any event, it goes to a person who reviews it. The person reviews it, as I said this morning, to see whether it satisfies the registration form; that is to say, whether it supplies the specific items of information called for by the form.

He also looks to see whether it supplies the items of information by what are called "Guidelines to Registration." These are qualifications of the Securities and Exchange practice. It is surely the gloss. It says if it asks you for thus and such this is what we mean in a variety of contexts. They would look for that. And the person reviewing it would look to see whether it meets the general requirements of the Securities Act, and a particular Rule 408, that is even if the form does not call for information and even if the guidelines don't, if it is something an investigator should know it should be in there.

Some other things would be happening in the financial department. The accounting staff of the Securities and Exchange Commission -- there would be one to each reviewer -- the accounting staff would be looking to see whether it satisfies the Securities & Exchange Commission's accounting regulation. There are extensive regulations as to form and content.

The result of this would be what is called a letter of comment.

"Dear Mr. Bloomingdale:

"We have reviewed your registration statement. It is generally okay except on Page 1 it appears that thus and such is inconsistent," or "Tell us how you get this conclusion," or "The facts don't appear to support this."

The Securities and Exchange Commission in 1969 is in the practice of sending a two-page or three-page document which was comments that are generally applicable to a registration statement, and in the 20 or so paragraphs they would take a look -- they could check three, five, seven, and ten, or whatever the numbers were, to save them typing time, and the effect of that was to say, "This applies to you."

MR. SANTORA: I think you have answered the question.

THE WITNESS: I have not finished.

A (Continuing) At that point the company would typically respond. They would attempt to deal with the questions. They would either call the Securities and Exchange Commission or they would go down, while they are beginning to compile the information which the Commission

has requested.

Sometimes the Commission is wrong. It asks for certain information and you say, "If you people understand this correctly you would see it is there," and so on. This eventuates in a subsequent amendment which would respond to the Security and Exchange's inquiries in a form that has been worked out in telephone conversations or in meetings, or it doesn't have to be worked out because it is so clear, and when you get to the point where all of this is done the registration statement becomes effective.

Q Is the Securities and Exchange Commission required to write back to the filing company within any specified time?

THE COURT: Let's find out if they were required to do so in the fall of 1969.

A I can answer the question but it will take a paragraph.

The Securities Act provides that after 20 days a registration statement becomes effective automatically. This is an administratively impossible thing, because registration would become effective before people would have a chance to function on it. Therefore, there grew various ways of delaying the effectiveness until the Securities and Exchange Commission got a chance to comment on the letter

of comment, which I have referred to as something that the Securities and Exchange Commission considers to be one of its greatest administrative achievements because it deals with the problem that the Statute did not, I would say, as a matter of practice, the Securities and Exchange Commission does respond. There is nothing in the law that says it has to do this.

Q You said you saw Exhibit 39 before, which is the Securities and Exchange letter of October 16.

A Yes.

Q In relation to the statement filed on August 28, was it possible for that statement to become effective before October 16?

MR. FREDERICKS: Which statement? The one filed on August?

MR. SANTORA: August 28.

THE COURT: More than 20 days had elapsed since August 28.

A The registration statement that was filed in August which bears the date of August 28, the company could have let it become effective before this time, but that would have been foolish and, obviously, no responsible person would have let this happen.

If the purport of your question is, would the

company have permitted it to become effective before it had the comments of the Securities and Exchange Commission? The answer has to be no, because so far as the Securities and Exchange's comments, they tell the company things that ought to be included in the registration to enable it to satisfy its requirements. To tell investors everything clearly you would not want to proceed without the benefit of this information from the Securities and Exchange Commission. So October 16th certainly is a date before which, in this context, a registration statement filed on August 28 could not become effective.

Based on this and assuming an August 28th date, this does not seem to me to be unduly burdensome, although it does not contain accounting comments which came later. The registration could not have become effective any earlier than this and would have become effective somewhat later when the comments were met.

Q Because of the date on these comments, October 16th, and your receipt of later comments, do you still take the position that that statement should have been ready with 70 days of August 28?

A My position was that it should have been ready 70 days within June 20th. This was October 16, which is about 40-some odd days after the original filing. Had they done

everything that they were supposed to do this one could have been effective 70 days after August 28th, I believe. That is, however, irrelevant to my view.

Q Do you know when the financials were ready?

A The original financials were ready on June 6, which is the date of the original filing.

Q Is that the annual report you are talking about?

A That's the financials of the year ended March 31, 1969.

Of course, to the extent that a company delays after the filing of the year-end report, it runs into a requirement that it has to update, that is to say, financials as of a certain date are good only for that particular time, but if you run past that time you have to give supplementary information for a shorter time. I don't think that's the responsibility of Mr. Marx if the company's failure to act promptly put the company in that situation -- if that's the thrust of your question.

Q Have you ever had any comments from the Securities and Exchange Commission, Mr. Freidman, that delayed the effectiveness of a registration statement for more than 70 days?

MR. FREDERICKS: In that period of time?

MR. SANTORA: In 1969.

A No.

In 1963 it took 120 days once to get a letter of comment and we refused.

The 70 figure that has been cited is a reflection of the workload of the Commission of the particular time, so it would vary. There have been times when you would get letters of comment and you could be effective in two weeks, and there have been times when it takes four months. It depends on the time, and my testimony with reference to the Securities and Exchange report is intended to place it in the context of a specific time run on the basis of the public information which should have taken approximately 70 days.

Q Is that an average figure, 70 days?

A I think so. I think that's the average length of time in which -- That's the average length of time during which the registration statements which become effective at such and such a time had been on file at the Commission and became processed. It takes into account General Motors, which might take five days, and a speculative issue, which might take five months.

Q Is that a median figure?

A Median in the sense that half are longer and half are less long? The word "median" does appear in the

Securities and Exchange report. I have been using "average" and I think if you ask me, given the fact that the company was filing 10K's and was a reporting company and had a proxy statement and did all this, 70 is rather generous to the company. I should think it would be on the lower side, but I am content to rest with 70 because that's the best information we had at the time.

THE COURT: Off the record.

(Discussion off the record.)

THE COURT: We will take a five-minute recess.

Please do not discuss the case amongst yourselves. Keep an open mind on all facets of the case.

I still adhere to the promise I made. I will try to do better.

(Recess.)

CROSS-EXAMINATION (Continued)

BY MR. SANTORA:

Q Mr. Friedman, is it your testimony that Diners was required to file a registration statement by June 20th, notwithstanding the fact that Diners had not received the advance payment of half the expenses from Mr. Marx?

A Yes.

Q Is it your testimony that Diners was required to file the registration statement by June 20th notwithstanding

the fact that Mr. Marx had not furnished Diners with a sound indemnification?

A Yes.

Q Is it your testimony that Diners was required to file a registration statement by June 20th notwithstanding the fact that Mr. Marx and Diners were discussing alternate proposals to registration?

A Yes.

Q Are you certain that the 10K filing requirements for 1969 was 90 days, sir?

MR. FREDERICKS: Asked and answered several times.

THE COURT: He said the last time he was not certain, and perhaps he has had a chance to think the matter over, or perhaps he is in a position to be somewhat more certain that he was the last time. I am willing to let that question be answered.

A I believe that the requirements at that time were 90 days.

MR. SANTORA: I would like to ask the Court to take judicial notice of Securities and Exchange Commission release 9000 dated October 21, 1970, effective January 1, 1971, changing in 1971 the filing time to 90 days for 10K's which had previously, in 1969, been 120 days. I would furnish a copy of that report to the Court; I don't have it

with us.

MR. FREDERICKS: No, no, no.

THE COURT: Please.

I have heard a representation from counsel. If he has made a misrepresentation I will deal with the matter. I accept the representation as having been made in good faith.

Do we have the release number?

MR. SANTORA: 9000, dated October 21, 1970, effective January 1, 1970. We will provide the Court with a copy.

THE COURT: That would be in the CCH Services, would it not? I suggest that one of you adjourn to my chambers and bring back the loose-leaf Service which contains that release. I will call them and tell them that you are coming.

(Pause.)

BY MR. SANTORA:

Q Prior to today, how many times have you testified in court?

A This is the third time.

Q How many times in addition have you testified in depositions?

A I have to withdraw my response. This is the

second time I have testified in court. The other time was in a deposition.

Q Who retained you on the other occasion?

A On the first occasion it was the plaintiffs in the case of Republic Industries against Lionel, and in the second case it was the plaintiffs in the case of United Telecommunications against American Television and Communications.

Q Who were the lawyers who retained vou in those cases?

A In the first case it was Sheldon Elson of the firm of Orens, Elson & Polstein in this city.

In the second case it was a lawyer named David Ebel of a firm in Denver which was named Davis, Graham & Stubb.

Q Are you being compensated for your services in this case?

A Yes.

Q How much are you being compensated?

A At my normal hourly rate.

Q What is that?

A $125 an hour.

Q Have you been paid yet?

A No, I have not.

MR. SANTORA: I have no further questions, your

Honor.

MR. FREDERICKS: I have one question, your Honor.

REDIRECT EXAMINATION

BY MR. FREDERICKS:

Q Can you tell me who the attorneys were for the defendants in the case in this court wherein you testified on behalf of the plaintiffs?

A Yes. The firm of Olwine, Connelly, Chase, O'Donnell & Weyher. The lawyer who represented that firm in that case was Mr. Tolan.

Q Mr. James Tolan?

A The one sitting next to you at the table.

MR. FREDERICKS: I have no further questions, your Honor.

THE COURT: We do have that one matter before I deal with the question of where we go from here.

MR. FREDERICKS: Your Honor, assuming the document is what it is, I don't really think it will affect any questions I may have of this witness.

THE COURT: You are prepared at this time to accept the representation?

MR. FREDERICKS: No, no.

THE COURT: Subject to verifying it.

MR. FREDERICKS: What I am saying, no matter what the representation of counsel proves to be, it will not affect my wanting to ask this witness any questions.

THE COURT: I will accept Counsel's representation, but I tell you now that I will check it with you and if there is any change in the matter the jury will be notified.

Are there any further questions of this witness?

MR. FREDERICKS: I wanted to read the last of that sentence that they were talking about.

THE COURT: I said you could.

MR. FREDERICKS: I didn't know whether to do it with the witness or otherwise.

I am reading from Plaintiff's Exhibit 5 in evidence, Page 39.

THE COURT: Do you have any other questions?

MR. FREDERICKS: No. I have no further questions of the witness.

THE COURT: Maybe your adversary does, after you read it. I will have the witness remain.

You may read it.

(Mr. Fredericks read from Plaintiff's Exhibit 5 in evidence from "The notifying holder" to "with such registration statements.")

BY MR. FREDERICKS:

Q Was that the language you were referring to in the contract in your responses to cross-examination?

A Yes.

MR. FREDERICKS: Thank you, your Honor.

THE COURT: Do you have any other questions? Do you want to inquire on recross-examination?

MR. SANTORA: I don't, but as long as he mentioned out-of-pocket costs I want to refer to Defendants' Exhibit PPP, which is in evidence, and lists the registration fees, printing costs and so forth. The total is $70,270.

MR. FREDERICKS: Again we are going to read from the rest of the document.

(Mr. Fredericks read from Defendants' Exhibit PPP in evidence from "As you know" to "Sincerely, George Faunce, III.")

THE COURT: Are there any other questions of this witness?

MR. SANTORA: No questions of this witness.

THE COURT: Mr. Friedman, you are excused.

(Witness excused.)

MR. FREDERICKS: I would like to mark two documents, your Honor.

(Plaintiffs' Exhibits 55 and 56 were marked for

discussions I have had with counsel and a promise that I made to them relative to the time they would have, that each counsel will take one hour for his summation. Following the summations, I will charge the jury, and I expect to be in position to give you the case by lunchtime. I won't say what lunchtime will be, but that is the way I anticipate it at the moment. So the jury is excused.

Please keep an open mind on all facets of the case. Although you have heard all the evidence, you have not heard the summations or the charge. So keep an open mind on all facets of the case.

The jury is excused until Tuesday at 9:30 a.m. Enjoy your weekend and the holiday.

(Jury excused.)

THE COURT: The Court is prepared to hear the motions of counsel. I would suggest that we first hear the motions on behalf of the defendants made at the conclusion of the entire case, and then hear the response to those motions from the plaintiffs and their motion or motions, in turn, regarding the defendants' counterclaim, and, finally, any response which counsel for the defendants wishes to make to the plaintiffs' motion relative to the counterclaim.

Is that agreeable to you, gentlemen?

MR. FREDERICKS: Anything that is agreeable to the

Court is agreeable to me.

THE COURT: It seems logical to me.

MR. FREDERICKS: Any way that the Court will choose.

THE COURT: You may proceed, Mr. Kay.

MR. KAY: Your Honor, the defendants move for a direct verdict in favor of the defendants with respect to the plaintiff's 1968 claim on the grounds that in order for the plaintiffs to approve that claim they must also prove that they had attempted to or in part succeeded in procuring information which was or would be deemed to be material inside information and that they sought to use such information for their own interest in controvention of Rule 10B5 that they complain has been violated. It is a form of in pari delictodefense which we briefed here on, and I will only briefly go over the facts that we think are pertinent, and we have already referred your Honor to the Kuehnert and other cases as to Kuehnert on this topic.

THE COURT: I am troubled by one promise here. I think that under the Kuehnert argument as neatly constructed as it is, and that had to do with inside information, from what I can see, every house on the street and half the newspapers in town were carrying the same information as we have had presented to us here. Perhaps you want

to deal with that and then go on.

MR. KAY: Your Honor, I think what I started to say was that in order for them to prove a claim they would have to prove that the claim would be actionable under 10B5, that it would be barred by an in pari delicto defense. That is the claim they seek to offer in this court, that they relied on the very same information that was freely available in the newspapers and in rumor on the street for two years before the time that they claim they relied on it, and in our view they had not made either the 10B5 claim.

If, however, they claim that they had some special information and that that information issued from people who would be deemed to be insiders of the defendant corporations and if that information was different from street rumors and newspaper articles and as to the effect they have claimed, if they are to be believed, that the takeover of Diners was going to occur within 30 to 60 days of September, 1968, then that type of information, that special information that was not available to other people, would be deemed to be inside information, and what the plaintiffs seek here is to have the Court enforce a speculation by which they sought to take advantage of inside information in which they claim they lost as a result of, and

the Kuehnert case and cases after that preclude such recovery, and the only exception which the plaintiffs have sought to use as a technique of taking our case out of the Kuehnert case is really in apposite.

THE COURT: The Nathanson case.

MR. KAY: The Nathanson case involved a fiduciary relationship between the plaintiff and the defendant. The defendant in that case was in a relationship wholly different than here. They were not sophisticated parties. And it seems to us that our distinction of that case is correct and that our case is clearly within the line of the Kuehnert cases. The Nathanson case involved a husband and wife. They were purchasing securities from a brokerage company. They claimed that they were misled and they sought and obtained a finding of liability. Our case involves a situation in which Mr. William Fugazy, who was at the time in question the president of the defendant Diners, who claims that by virtue of his position as president he had the ability to sit in meetings with Alfred Bloomingdale and Victor Herd, and in the course of those meetings he obtained information that he passed on to Marx to the effect that this company was going to be taken over within two months, and on that basis and only on that basis did he enter into a transaction which would

have given him the Diners stock at a lower value than the Diners stock would have had if that information that he obtained in those meetings had been in the public. He was trying to get a bargain purchase which would result in a higher value in the stock after the information became public.

We think this is exactly the kind of case that Kuehnert contemplated and the cases after Kuehnert that follow it, which seek to have this Court not involve itself in a situation where one has violated 10B5, engaged in a transaction that sought to use inside information and complain when he loses. On that basis, we would move for a directed verdict and that plaintiff's claims if they are made out would be barred.

In addition to that ground, we would further move for a directed verdict on the '68 claims on the basis that the plaintiffs have not shown that they were damaged, and damage is an essential element of 10B5. You really have no liability unless you can show damage. We say they have not shown damage.

THE COURT: Then you say they did not have anything in hand, all they had were basically contingent rights? Is that your argument?

MR. KAYE: We say further. Well, it is true

without any other fact the most they had was a contingent right, the right which under the agreement could be terminated at the will of Diners. Diners had the right at any time for any reason whatsoever within its sole and absolute control to stop selling franchises. So there was no inferred obligation, as there would be in the absence of such express provision to go on and sell franchises. And if the plaintiffs had not agreed to change the cash compensation possibility into something else, it was within Diners' power at the time without any liability at all to simply stop selling franchises. So it is that we claim that the plaintiffs did not begin with anything.

We also claim on the basis of Mr. Fugazy's own testimony and admission, Mr. Fugazy violated the express terms of the 1967 agreement, that is, the October 10, 1967 employment agreement.

THE COURT: Because he was competing?

MR. KAY: Because he was owning, operating, managing in this case by his own testimony directly, although the matter is much broader than that, the Madison Avenue office, which was a violation of the express provisions of that agreement. So that had Diners known about that at that time, had they discovered it, they would have been in position to terminate the agreement on that

ground.

THE COURT: Isn't that a fact question for the jury?

MR. KAY: It is an admission in court and we can't see how there can be any doubt, because there is no conflicting evidence on it. Mr. Fugazy has admitted that he was in that company, that he had an interest in it, that there was a secret indemnity agreement, and that he would come into possession of 60 percent ownership of the company. He further admitted, aside from the indemnity and equity interest, he was operating the company, he was an officer and director. That is a violation of the agreement.

THE COURT: I am not sure it is so clear that I can find that as a matter of law.

MR. KAY: Then I should refer to the agreement itself. The language would make it clear.

Your Honor, if there is a lack of clarity to which you are referring as to whether or not Mr. Fugazy was an officer or director, I will refer you to the Interrogatories the answers thereto, which were read in the record, which were answered, to the effect that Mr. Fugazy was, in fact, an officer and director of that company during the relevant period.

MR. FREDERICKS: We stipulated to that fact.

MR. KAY: There is a stipulation.

THE COURT: If that is the fact, let me just ask Mr. Fredericks, what about the Court's holding that there was a violation of the agreement by Mr. Fugazy as a matter of law?

MR. FREDERICKS: Your Honor, Mr. Fugazy testified and it was uncontradicted, and several other people testified, they were officers and directors of a hundred different subsidiaries, that there was the necessity of them having to continue to be involved. Louis Fugazy testified, William Fugazy testified, I think Mr. Asch said they were pro forma officers and directors, but Mr. Fugazy testified uncontradicted from that stand that he sold his interest in that company prior to October 30, 1967, when he signed that affidavit.

THE COURT: He sold his interest, but he was being repaid from the operating profits.

MR. FREDERICKS: No, he was not being repaid for anything. The operating profits were to pay off the indemnity agreement that he had indemnified Fruchtman in connection with the bank loan. There is no evidence Mr. Fugazy was getting one brass farthing from that company. He said that.

THE COURT: Does it matter if he was getting cash

or he was being relieved of a substantial liability by virtue of the business that he generated for that company?

MR. FREDERICKS: Your Honor, it makes a great deal of difference. Mr. Fugazy testified Mr. Fruchtman had gotten a bank loan, that that money was used in the operation of the Madison Avenue operation, that that bank loan was being paid off by the operating profits of the company, that Mr. Fugazy personally had an obligation to Mr. Fruchtman to indemnify him for losses against that bank loan arising out of the transaction that took place before October, 1967, before the sale of the company. Now, the documents and the schedules go on ad nauseam about this Travelco operation.

THE COURT: Let me ask one specific question: You said the Fugazies were officers and directors of many companies. Is there an indication direct or circumstantial or something from which the jury can draw an inference that Diners was aware that Mr. Fugazy had this very involved interest in Travelco?

MR. FREDERICKS: I can't answer your question because I don't know what you mean by this "very involved interest." Mr. Fugazy's interest in Travelco, as far as I am concerned, was not very involved. He owned it in June of 1967 and when they went to sell this to Diners' Club he

was told, "Dispose of it." The agreement specifically provides for it. He can sell his interest out to Mr. Fruchtman or to some other person unknown. Nobody asked him about it. But he said he sold his interest out. Now, his involvement was the fact that in the course of that operation he had to indemnify Fruchtman against a bank loan. That is the sole involvement he had with that company. It is not very involved; it is not very devious; and Travelco is mentioned in this schedule, it takes up three pages in one section, a paragraph in another section. It is all over the place.

THE COURT: Mr. Fugazy's connection with Travelco as an indemnitor, is that mentioned in the agreement? Is it mentioned anywhere to Diners' Club as far as the record is concerned, the record before this Court and jury?

MR. FREDERICKS: Your Honor, it is not mentioned anywhere before this jury or in this record, but my answer to that is that I see no relevance to that, to their claim or to Mr. Fugazy's claim.

THE COURT: Well, you and I don't see eye to eye on that one. But let me get back to Mr. Kay.

MR. KAY: Your Honor, I think the transcript of Mr. Fugazy's testimony on this issue shows that he had an indemnity arrangement that was undisclosed with Mr. Fruchtman

and that indemnity arrangement was to the effect that when the bank loan was satisfied, he, Mr. Fugazy, and his brother, Louis, would somehow obtain 60 percent of the stock of Travelco, and that, in fact, the bank loan subsequently was paid, and I think that is what Mr. Fugazy testified to. But, in any event, when I read the places where this Travelco thing is set forth in the agreements that were executed in October of 1967 is this one that I would like to read, 6A of the October 10, 1967 agreement, which is Plaintiff's Exhibit No. 7.

THE COURT: In consideration of the execution by DFT of this employment, the employee agrees that for the period set forth in Paragraph B below he will not in any manner, directly or indirectly, engage in the business of providing travel or related services or licensing or franchising or offer to provide such services, or engage in any business which competes with any of the fields in which Fugazy is presently engaged, and he will not directly or indirectly own, manage, operate, join, control, or participate in the ownership, management, operation or control of, or be employed by or connected in any manner with any corporation, firm or business that is so engaged without the DFT's prior written consent. For the purpose of the foregoing, Travelco, Inc. (PA.) and Travelco (New York) shall

be deemed engaged in the travel business.

The period in question that was set forth in B was to commence on the effective date of this agreement and terminate at a time clearly later than the time in question. So I don't think there can be any question that this provision was in effect at the time Mr. Fugazy's employment agreement was changed to a new agreement. And I might point out that the new agreement, that is, the agreement that was executed in '68, contains virtually the same non-competition provision, and we consider that one to have been executed similarly when Mr. Fugazy knew that he was involved and that he was in violation of the very covenant that he was going to execute in October '68. So with respect to plaintiffs' '68 claim, another reason that we feel that in determining damage, that they were not damaged, is that this contract was terminable at the will of Diners' Club had they known of the breach. But the breach, of course, was, concealed, and we feel that Diners should not suffer because of the act of concealment of the breach until a later time when it was finally discovered.

(Continued on Page 1819)

THE COURT: Before we move from that, I have noted that page 1528 of the record, line 24, the following testimony by Mr. Fugazy in response to an inquiry by the Court:

"Your Honor, the indemnity was not against lawsuits; the indemnity was Fruchtman borrowed $75,000 from the bank and my brother and I guaranteed him if he had to make good on this loan, we will make good. And after the Franklin Bank was paid off we would get 60 per cent of the stock and he would get 40. It does not have anything to do with losses at all."

MR. FREDERICKS: At some point in that record he testifies that that was the arrangement before the Diners' Club deal, and when the Diners' Club deal came into being he sold out his interest, and that is why he gave the affidavit.

THE COURT: No, because Mr. Santora picks this up at page 1530, line 7:

"Q You mentioned a moment ago that after payment to Fruchtman you would wind up owning 60 per cent of the stock.

"A Something like that, 59 per cent--control. I have not seen the papers.

"Q That was the stock of Travelco?

"A Yes. I don't know if it was 60."

MR. FREDERICKS: Your Honor, that is exactly right, and then he was asked whether on October 30th he had divested himself of any interest directly or indirectly. Remember that this indemnification agreement came into being in June, before the Diners' Club came into the picture, and the indemnification arose out of the original transaction. And what Mr. Fugazy is talking about there is under the circumstances as to why he gave the indemnification.

Further, your Honor, the record will show that Mr. Fugazy testified that that indemnification had washed itself out by January or the early part of '68, bearing in mind the fact that there was sufficient funds to pay off that bank loan.

THE COURT: I recall that. My understanding was that after the bank was paid off, the Fugazys were to get a controlling interest in the business.

MR. FREDERICKS: That was the understanding when the indemnification came into being in June, but when Mr. Fugazy was required under this Diners' Club acquisition to divest himself, he divested himself of all of his interests.

THE COURT: Where is that?

MR. FREDERICKS: It was in the affidavit that

he submitted to the Court.

THE COURT: He represented that he had divested himself, but where in the record does it show that this agreement which he had relative to Travelco was in some way terminated?

MR. FREDERICKS: Your Honor, Mr. Fugazy testified that he had entered into an indemnity agreement in June or July when the deal was put together and that was the terms of indemnity. He then signed an affidavit and represented to this Court on October 30th that he had divested himself of any interst directly or indirectly.

Now, your Honor, I suggest at that point there is nothing in the record to suggest that Mr. Fugazy's testimony on that matter was not correct.

And, therefore, having testified that he had divested himself of all interest, directly or indirectly, I think the matter is put to rest, because there is no evidence to the contrary.

THE COURT: Let's hear further from Mr. Kay.

MR. KAY: Another reason we submit there was no damage was that after the change in this agreement in October of 1968 the number of franchises that actually was sold was no greater than 45 to 50, according to my best recollection, which under the terms of the original agree-

ment would have given to the plaintiffs at most $450,000 to $500,000 income out of the agreements, when, in fact, as a result of the change they received not only the stock, which even by the lowest measure of sale resulted in income to them of some $500,000,plus they received $180,000 in forgiveness on a note, plus they received various intangible rights in the form of limitations on liability and releases and things of that kind.

So that on the basis of the cash loan, using the very lowest price for the stock that could be used, the plaintiffs ended up better after the change than they would have before the change, and we think that that is a defect insofar as proof of damages is concerned, and we submit it is the basis for a directed verdict in the case.

A further reason that we submit would justify a directed verdict here is that this ties in somewhat with the argument that we previously made with reference to in para delicti, that it is really incredible as a matter of law that the plaintiffs relied, as we submit it is their claim, or could have or should have relied on the representations that they claim to have been made.

THE COURT: I really think that is for the jury, if I get to that point. I must say that it is not so inherently incredible. I know you say that these people

are knowledgeable, that Mr. Marx is a sophisticated investment banker, and that Mr. Fugazy also is a man with business experience.

I suggest that under the circumstances as I view this whole matter this would be a question for the jury to weigh, having seen and heard all of the parties in this courtroom.

MR. KAY: I won't continue on this.

THE COURT: If there is anything you want to add, you may.

MR. KAY: Mr. Marx is an investment banker of some 40 years. Here is this representation in 1967, and he continuously lies on it for a year or more, and also with respect to the '68 claim, without making any independent examination.

But he also had as his source of information Mr. Fugazy, who on the basis of the other facts that have been proven at the trial with regard to the past relationship and the events that occurred between those two individuals and the knowledge that Mr. Marx had of Mr. Fugazy's prior activities, here was not a person whom Mr. Marx should have relied on in this context, in any event.

We think that is additional fact that makes it incredible as a matter of law, that he did rely.

THE COURT: I disagree with you on that.

MR. KAY: We feel with respect to the scienter elements that the plaintiffs have failed to make out in any respect any knowing or reckless disregard for the truth. It is, at best, that they might have made out a claim with respect to a representation, however vague, about some kind of takeover, but the connection between that and any kind of knowledge certainly is absent.

The suggestion is of an inference that it might have been something reckless here, but nothing more. We do not feel it was adequately presented and should be the basis of a directed verdict alone.

That is the argument for a directed verdict with respect to the '68 claim.

With respect to the best efforts claim, we think with respect to that claim that the Court should also grant a directed verdict in favor of the defendants for the reason that as a matter of contract the first obligation on the part of Diners' to file the registration statement could not have ripened before August 26th, which was the first time that the two express conditions of that 10.2(b) clause of the agreement had been fulfilled, fulfilled on the basis of a compromise with Diners', one, the satisfactory arrangement with respect to the payment, and

that was accomplished by Diners' agreeing to, at least, not insist upon payment, but accept a promise to pay or a guarantee to pay, and, the other, the indemnities that were required to be delivered by the selling shareholders, the plaintiffs in this case, and that was not fulfilled until about, I think, the 24th of August.

So, it is that the registration statement was filed within four days of the satisfaction of the indemnity condition and within two days of the satisfaction of the payment condition, and that can hardly be regarded by any stretch of the imagination as not a prompt filing after the first time that Diners' was obligated to file.

THE COURT: I think that is a very valid argument which you could make to the jury. But I am inclined at this point to leave that to the jury.

MR. KAY: Further, on the same point, that is, the best efforts claim, we believe that the testimony on the part of plaintiffs, and particularly from the experts, is wholly misguided as a matter of law.

The best efforts obligation is an obligation for Diners' to use its best efforts, and that suggests not that Diners' had to engage in activity of the ultimate and the best kind, but merely that Diners' had to engage in a good faith processing of the registration statement in an

attempt to make it effective, and there has been no proof, none at all in Court that Diners' failed to do so.

The only proof that has been submitted, the only attempts to submit proof, have been those showing the time period that was consumed was longer than the time period which other people might have been able to accomplish a registration statement in.

THE COURT: Well, they put on their expert, Mr. Friedman, and I think through him they made out a prima facie case.

MR. KAY: Mr. Friedman's testimony when viewed in terms of its weight or its believability has to be measured in the light of Mr. Friedman's admission that in the course of preparing for his testimony he did not do any research, to look at and opine on the basis of the law of '69.

His only testimony was with respect to a 10-K, and as to that he was using the law of 1975 in a case that relates to an event in 1969, and he admitted when he was being qualified and in the beginning of his testimony that he has been supervising PLI forums because the law in the securities field is so rapidly changing that everybody has to continually study it, and I think his testimony should not be given any weight at all, and without it a case of

best efforts has not been made out at all.

THE COURT: Anything else?

MR. KAY: Further, we have, I think on the record an admission by Mr. Fugazy to the effect that the Diners' Club had tried, had engaged in efforts that were geared to overcome the monumental difficulties, and there was really nothing other than that on the record of any substance.

So, on that basis we would move that the Court grant a directed verdict to the defendants with respect to the best efforts claim of the plaintiffs.

With respect to the claims of the defendants on their counterclaim against the plaintiffs, we would request and move for a directed verdict on the defendants' claim.

THE COURT: Anything else?

MR. KAY: I would like to just outline very quickly for you the basis for this motion.

THE COURT: On the counterclaim?

MR. KAY: Yes.

THE COURT: Don't.

MR. KAY: Then, your Honor, I have no further argument.

THE COURT: I have considered the matter since the close of the plaintiffs' case, with respect to the '67

claim I concluded that there was no reliance on date and I reached the conclusion based on a search of the record that there were no material misrepresentations in connection with the '67 acquisition, I do find that there were representations sufficient in the record to put the case to the jury relative to the 1968 claim.

Accordingly, because I do not agree with your para delicti argument and do not believe that you have made out a sufficient legal case to justify a directed verdict either with respect to the 1968 claim or the best efforts claim, the motion for a directed verdict on the 1968 claim and the best efforts claim and with respect to your counterclaim is denied.

I will hear from counsel for the plaintiffs. I would suggest, counsel, that I have read all of the material that has been presented to me. I suggest in view of the lateness of the hour, it being 5:15, that you be brief.

MR. FREDERICKS: Your Honor, I fully intend to be brief. I have before me the defendants' trial memorandum. I submit to your Honor that the defendants have failed to introduce a scintilla of evidence on any of the allegations made in that brief, that the entire case that we have listened to for the past two weeks has been made up of innuendos

and questions unanswered, but not one scintilla of evidence with respect to the plaintiffs' claim in the first instance of F.T. Ventures'involvement for four years preceding the Diners' Club acquisition, not one bit of evidence has been introduced that Mr. Marx was connected with fraud in Tower, no evidence that Mr. Fugazy had made certain misrepresentations to Tower.

Counsel has argued at length, but no evidence has been gone into in this record.

Basically, your Honor, they have produced Mr. Hays, Mr. Asch, Mr. Flug from Diners' Club. Mr. Asche says he was not involved in the negotiations on the acquisition agreement. Mr. Hays says, yes, he was involved in the negotiations and in the acquisition agreement, but he does not remember any of the conversations. And Mr. Flug had no participation in those negotiations.

I, therefore, suggest, your Honor, that there is not one bit of evidence that any allegations or representations were made to these defendants of any kind which they can claim to be false, fraudulent, or misleading.

THE COURT: Relative to the sale of the 342 Madison Avenue office, from this Court's point of view that would permit me to conclude that on that alone they have made out a prima facie case.

MR. FREDERICKS: Your Honor, I must take issue with that. There has been no testimony about that, except the following: Mr. Fugazy said in June the deal was made. It was fully disclosed and it was all set forth in the statements. The only testimony we have is that of Mr. Fugazy, because nobody else talked about it. It was fully disclosed. He testified under oath from this witness stand, your Honor, and there was not one bit of evidence to contradict it, that he disposed of every interest.

Now, they talk about running the operation. There is a management agreement, your Honor. Part of the closing documents is a management agreement which requires Diners'/Fugazy Travel to manage and operate Travelco.

THE COURT: With Mr. Fugazy to be relieved of an indemnification agreement if the operation prospers, for him to be relieved of personal liability--I don't find that disclosed to Diners' Club anywhere, and I draw a completely different inference.

MR. FREDERICKS: I will accept your position. Now I ask you the next question: What witness said in this courtroom that had they known about that situation that they would not have gone through with this deal? What witness said in this courtroom that that was a material representation? What witness in this courtroom in any way

connected that or the failure of that disclosure to this acquisition? The answer is not one.

THE COURT: I find that the documents speak louder than any witness, and I will give you one example: Diners' Club thought enough of this to put a non-competitive clause in the acquisition agreement. Am I right or am I wrong?

MR. FREDERICKS: They put in a non-competitive clause and they knew this man was managing the operation.

THE COURT: I was not in the position that perhaps you are in in a case here a number of years ago where the Government stood up in a stock fraud case and said, "Forget all the live testimony of the Government's witnesses," and then there began an excellent presentation by an Assistant United States Attorney to construct a house of documents.

And I would suggest that though the case here may not be as strong as the case there, there is enough in this case to go to the jury on the counterclaim.

MR. FREDERICKS: I suggest that you have thrown out the first cause of action on the basis that there was not reliance.

I suggest we have not heard one live witness or document or otherwise to show no matter what the situation

was that they would have taken a different course.

THE COURT: I just added to my dismissal of the first cause of action the comment that you heard me make here, that on a review of the record I find no material misrepresentations. That makes it different.

MR. FREDERICKS: I accept that comment, except there is no evidence here to show that that failure by Mr. Fugazy to disclose that would have made any difference, particularly when the testimony indicates that that matter was resolved by January of 1968.

So, I suggest, your Honor, that no matter which way you go, the Court cannot sustain that position, because Mr. Fugazy's testimony uncontradicted is that in January of 1968 that indemnity was washed out.

Now, your Honor, I would suggest October, November, December, those three months cannot make this failure to disclose material. And there has not been one witness on that witness stand who said it would be material, not one.

THE COURT: Nobody stands up and says it is or it is not material.

MR. FREDERICKS: Nobody was even asked about it, "If you were told or if you knew would you have acted differently?" The defendants have that burden and they

didn't take it.

They could have brought Mr. Bloomingdale here to testify.

THE COURT: On the matter of reliance the Court has given some consideration over the last week to the May 8 decision of the Court of Appeals in Competitive Associates, Inc. against Laventhol-Krekstein, a decision which I know you are familiar with. Though that case may be distinguished, I would direct your attention to the comments of the Court of Appeals.

MR. FREDERICKS: Yes, but let's go to materiality Three months, according to Mr. Fugazy's uncontradicted testimony, was all it took to wash it out. There was a $75,000 indemnity. I suggest that this was not a $10,000,000 deal, or a $5,000,000 deal, but a $75,000 indemnity on a bank loan that went into the company for use in operating, and the failure to disclose that in and of itself is not material, and not one witness was questioned about it. Hays was here, Faunce was here, Asch was here. The financial men were presented to your Honor. They were not asked whether this was material.

THE COURT: But they asked Mr. Fugazy and the others for a flat outright representation. It is one of the exhibits. He stated he had no interest, direct or indirect.

MR. FREDERICKS: He had no interest. He had an obligation. And the question of materiality still

comes home to roost, your Honor. It was not material; it can't be material; it does not rise to that. You cannot take this $75,000 indemnification, which was half Mr. Fugazy s half Louis' and half William's and stretch it in these three months to a material misrepresentation without testimony. Now, maybe the United States Attorney who prepared that case on documents could, but this case, no. And I suggest if your Honor is telling me that the only question in the case is Travelco, there has been no materiality. Now, about the rest of the representations, there are not any.

THE COURT: There need only be one for me to deny the motion.

MR. FREDERICKS: One material one.

THE COURT: Yes.

MR. FREDERICKS: And your Honor has said that in our case there was "no material representation," and that is why you granted it, and I suggest here there is not one material misrepresentation.

I suggest that the counterclaim has been presented by accusations of counsel without the introduction of evidence. You have not had one person from the witness stand who has testified as to any misrepresentations which they relied upon and that were materially untrue, no one, and I suggest, your Honor, that the key man who might have

come in and proved their case, Alfred Bloomingdale, did not come in, and I suggest his absence defeats any hope that these defendants might have had to show misrepresentation, reliance, scienta, and so on. That was their entire burden. They have done nothing but accuse from counsel's mouth and have failed to produce one concrete witness and one thread of evidence that is material or relevant to these proceedings.

THE COURT: Thank you, Mr. Fredericks.

Having heard the case and noted the various documents as they were introduced in evidence has concluded that the plaintiff's motion to dismiss the defendants' counterclaim, failure to make out a prima facie case on reliance and materiality, false by virtue of the evidence in the record. I do not say that the counterclaim is the strongest, and I appreciate that you will argue to the jury about the actions of Mr. Bloomingdale, who, obviously, was mentioned more times in this trial than any other individual that I can think of, including perhaps Mr. Fugazy. And there are two Mr. Fugazies.

Under the circumstances, the plaintiffs' motion to dismiss the counterclaim upon failure to make out a prima facie case is denied.

MR. FREDERICKS: One question. I would like to just back up one second and suggest, your Honor, that you

have not heard from the defendants an element of their counterclaim, and that is damages. There has been nothing on that element at all from anybody or any documents.

THE COURT: May I suggest that you fought hard to keep that out?

MR. FREDERICKS: Yes, but I was successful.

THE COURT: You were not completely successful, and I think that a conclusion could be drawn from the very substantial losses sustained in connection with this acquisition brought about by the activities of the respective plaintiffs. Under the circumstances the Court feels that there are many damages for which the plaintiffs might be adjudged liable. Under the circumstances, though I am not about to characterize or categorize the amount, which I would consider to be less than what has been set forth in the papers that have been presented to me, I think there is sufficient for that question to be put to the jury.

The motion is denied.

Gentlemen, we will recess now and resume Tuesday at 9:30.

(Whereupon, an adjournment was taken to May 27, 1975, at 9:30 o'clock a.m.)

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* * * * *

him the letter, which is Exhibit P. And he qualified that by saying that he didn't think he had to pay the money.

In Exhibit PPP, Mr. Faunce asked for the money, demanded it. Look at that letter and you will see it not only made a demand upon Mr. Marx, but it tells of the enormous number of hours that were going into the preparation of that document, a reputable law firm putting in some three or 400 hours trying to get this thing rolling.

In any event, the registration was filed on August 28th, about four days after an agreement was finally reached, with Mr. Marx paying his money. He didn't even pay it then. He was given the right to promise to guarantee he would do it. He said he would do it. He never has. To this day Mr. Marx still hasn't paid one cent as agreed to under his original agreement, the very agreement and the very paragraph that seeks to recover for not registering the stock.

Four days after the indemnity and payment matter is resolved is not a late filing of this registration statement. And after that the correspondence will show that on November 18th Mr. Marx agreed to withdraw the statement in return for some consideration on the bank loans.

Previously he had requested an alternative to

* * * * *

AFTERNOON SESSION

1:55 p.m.

(In open court; jury present.)

THE COURT: It is the custom in this court that the juror seated in seat No. 1, in this case Mrs. Alma S. Roman, will serve as the foreman, or in this case forelady, or, if you prefer, the foreperson of the jury.

Her function will be to take the vote, and in the event the jury requires anything, to write out the requriements in the form of a note and to send the note out to me. I will then review the note, confer with counsel, and we will try to respond to your request, whatever it may be, as promptly as possible.

In this case -- and I will refer to it more later -- I have determined that it would be best that you be furnished with a verdict form. The form contains six questions which I have prepared and reviewed with counsel. You will note that the form is set forth in a way that you will proceed from question to question, following th instructions that are contained in the form, and answering those questions you deem appropriate. The form will be handed out to both Mrs. Roman and to counsel -- although I believe they have it now -- at the conclusion

of my charge.

Madam Forelady, Mr. Hladik, and ladies of the jury:

We come now to that portion of the trial where you are instructed on the law applicable to the case and then retire for your final deliberations. You have heard all of the evidence introduced by both sides and through arguments of their respective attorneys you have learned the conclusions which each party believes should be drawn from the evidence presented to you.

As the jurors, it is your fundamental duty to determine from all the evidence that you have heard, and the exhibits that have been admitted, what the facts are. You are the sole, the exclusive, judges of the facts. In that field you are supreme, and neither I nor anyone else, including counsel, may invade your province.

On the facts it is your recollection which governs. It governs over what counsel may recall to be the facts and what the Court may recall to be the facts, and in the event you disagree amongst yourselves, you are free to request that particular portions of the testimony, particular exhibits, be presented back to you. The testimony would be read here in the courtroom; the exhibits would be sent to the jury room upon your request.

On the other hand, and with equal emphasis,

I charge you that you are bound to accept the law of the case as it is given to you in this charge, and in any instructions that I have given to you during the course of the trial. Whether you agree with the law as given to you by the Court or not, you are bound by it.

The process by which you arrive at a verdict is first to determine from all the evidence and the exhibits what the facts are; and, second, to apply the law of the case as I give it to you to the facts as you have determined them to be. The conclusion thus reached will be your verdict.

I have endeavored to preside impartially and not to express an opinion one way or the other as to what you should find the facts to be.

In the course of the trial, it has been necessary for me to rule on the admission of evidence and on motions made with respect to the applicable law. You must not infer from any of my rulings or from anything I have said during the course of the trial that I hold any views for or against any of the parties to this lawsuit. Any views of mine would in any event be totally irrelevant since it is your recollection of the evidence and your determination of the issues of fact which control.

At times during the trial I have sustained ob-

jections to questions asked without permitting the witness to answer, and, on occasion, where an answer was made, instructed that the answer be stricken from the record and be disregarded. You may not draw any inference from an unanswered question, nor may you consider testimony which has been stricken in reaching your decision. The law requires that your decision be made solely upon the competent evidence before you. Such items as I have excluded from your consideration were excluded because they were not legally admissible. Arguments or contentions of counsel are, as I have said on occasion, not evidence and you must consider only the evidence.

There are, generally speaking, two types of evidence from which a jury may properly find the truth as to the facts. One is direct evidence such as the testimony of an eye witness, the testimony of a person who was a participant in a conversation. The other, indirect or circumstantial evidence, the proof of circumstances from which the existence of certain facts may or may not be inferred. As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that the jury find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

In making the factual determination on which your verdict will be based, you may consider only the exhibits which have been admitted in evidence and the testimony of the witnesses as you have heard it in this courtroom, or as there has been read to you testimony given on deposition. Under our rules, an examination before trial or a deposition, so-called, is taken under oath and is entitled to equal consideration by you notwithstanding the fact that it was taken prior to trial and outside the courtroom.

Stipulations or agreements of facts stated or concurred in by counsel for all parties are considered evidence in the case and stipulations or agreements of fact are to be accepted as true. The law does not, however, require you to accept all of the evidence I have admitted even though it may be competent. In determining what evidence you will accept, you must make your own evaluation of the testimony given by each of the witnesses and determine the degree of weight you choose to give to the witnesses' testimony.

The testimony of a witness may fail to conform to the facts as they occurred because he intentionally is telling a falsehood, because he did not accurately see or hear that about which he testifies, because his recollection of the event is faulty, or because he has not expressed himself

clearly in giving his testimony. There is no magic formula by which one may evaluate testimony. You bring with you to this courtroom all the experience and the background of your own daily lives. In your everyday affairs, as you go about your business, you determine for yourselves the reliability or the unreliability of statements made to you by others. The same tests that you use in your everyday dealings are the tests that you apply in your deliberations. I frequently say to jurors that you bring your common sense to the courtroom. I expect you to take your common sense with you into the jury room for your deliberations, and I expect that when you come out of that jury room your common sense and your good conscience will accompany you.

The interest or lack of interest of any witness in the outcome of the case, the bias or the prejudice of the witness, if there be any, the appearance, the manner in which the witness gave his testimony on the stand, the opportunity that the witness had to observe or know the facts concerning which he testified, the probability or improbability of the witness' testimony when viewed in light of all of the evidence in the case, are all items to be taken into consideration in determining the weight, if any you will assign to that witness' testimony.

If such considerations make it appear that there is a discrepancy in the evidence, you will have to consider whether the apparent discrepancy may not be reconciled by fitting the two stories together.

If, however, that is not possible, you will then have to determine which of the conflicting versions you will accept.

If you find that any witness has wilfully testified falsely as to any material fact, the law permits you to disregard completely the entire testimony of that witness on the principle that one who testifies falsely about one material fact is quite likely to testify falsely about everything. You are not required, however, to consider such a witness as totally unworthy of belief. You may, if you choose, accept so much of his testimony as you deem true and disregard what you feel is false.

By the processes which I have just described to you, you, as the sole judges of the facts, determine which of the witnesses you will believe, what portion of their testimony you accept, and what weight you will give to it.

The plaintiffs, Otto Marx, William D. Fugazy, Louis V. Fugazy, and John Summerlin as well as officers and employees of the corporate defendants, testified at this

trial. Each of them is what we call an interested witness. They are a party to the lawsuit, or officers or employees of a party. That a witness is interested in the outcome of a case does not mean that he has not told the truth. It is for you to determine from his demeanor on the stand and such other tests as your experience dictates whether or not his interest is such that he is likely unintentionally or otherwise to color his testimony. You are at liberty, if you deem it proper under all the circumstances to do so, to disbelieve the testimony of such a witness even though it is not otherwise impeached or contradicted. However, you are not required to disbelieve such a witness, and you may accept all or such part of his testimony as you deem reliable and reject such part as you deem unworthy of acceptance.

We have in the law what we call presumptions. Presumptions are deductions or conclusions which the law requires the jury to make under certain circumstances in the absence of evidence or circumstances in the case which leads the jury to a different, contrary, conclusion. A presumption continues to exist only so long as it is not overcome or outweighed by evidence or circumstances in the case to the contrary, but unless and until so outweighed the jury should find in accordance with the presumption.

For example, it is presumed that private transactions have been fair and regular, that the ordinary course of business or employment has been followed, that things have happened according to the ordinary course of nature and the ordinary habits of life, and that the law has been obeyed.

During the trial you heard numerous references to Alfred Bloomingdale. Mr. Bloomingdale was not called as a witness. I charge you that if it is peculiarly within the power of either side to produce a witness who could give material testimony on an issue in the case, failure to call that witness creates the presumption that his testimony would be unfavorable to such party.

However, no such presumption should be drawn by you where the witness is equally available to both sides. A witness known to be present in New York could have been subpoenaed by either side. Whether or not Mr. Bloomingdale was known by the plaintiffs to be in New York is a matter which I will leave to your recollection of the record.

Turning to the burden of proof, the burden of proof rests on the plaintiffs on their claims and on the defendants on their counterclaims. The "burden of proof" means burden of persuasion. The plaintiffs have the burden of proof on every essential element of their claims and

the defendants have the burden of proof on every essential element of their counterclaims. That means that it must be established by a fair preponderance of the credible evidence that the claims that the plaintiffs make are true. The same burden is on the defendants with respect to their counterclaims.

The credible evidence means the testimony or exhibits that you find worthy to be believed. A preponderance means the greater part of such evidence. That does not mean the greater number of witnesses or the greater length of time taken by either side. The phrase refers to the quality of the evidence, that is, its convincing quality, the weight and effect that it has on your minds.

The law requires that in order for a claimant to prevail, whether it be a plaintiff or a counterclaiming defendant, the evidence that supports his claim must appeal to you as more nearly representing what took place than that opposed to his claim. If it does not, or if it weighs so evenly that you are unable to say that there is a preponderance on either side, then you must resolve a particular question in favor of the other side, for then the claimant will not have carried the burden, the burden of proof, the fair preponderance of the burden of persuasion.

It is only if the evidence favoring a plaintiff's claim outweighs the evidence opposed to it that you could find in favor of the plaintiff. The same situation prevails with respect to a defendant's counterclaim.

If the proof should fail to establish by a preponderance of the evidence any essential element of a plaintiff's claim against any defendant, you should find for that defendant. Similarly, if the proof should fail to establish by a preponderance of the evidence any essential element of any defendant's counterclaim against any plaintiff, you should find for that plaintiff on that counterclaim.

If in the course of your deliberations your recollection of any part of the testimony should fail, or you should find yourselves in doubt concerning my instructions to you on the law, it is your privilege, if you so desire, to send out a note and to request that you be permitted to return to the courtroom for the purpose of having such testimony or instructions read to you. As I have noted before, I will try to comply with your requests as promptly as possible.

The plaintiffs in the first claim, which you will consider, charge that the defendants violated the federal securities laws and regulations, and that they were damaged thereby. Section 10(b) of the Securities Exchange Act

of 1934 provides "It shall be unlawful for any person, directly or indirectly, by the use of interstate means or of the mails, to employ any manipulative or deceptive device in connection with the purchase or sale of any security in contravention of rules promulgated by the Securities and Exchange Commission." The Securities and Exchange Commission promulgated Rule 10(b)5 which makes it unlawful for any person, directly or indirectly, to employ any scheme to defraud, to make any statement to defraud, or to do any other act which defrauds a person in connection with the purchase or sale of any security by the use of interstate means or of the mails.

This case, as it is now submitted to you, arises out of the sale of the Fugazy Travel Bureau, Inc. to the Diners' Club, Inc. in 1967.

Plaintiffs William D. Fugazy, Louis V. Fugazy and Otto Marx, Jr. contend that the defendants represented that the Continental Insurance Company was going to take over the Diners' Club, Inc. in October or November, 1968 in order to induce them to enter into the September 27, 1968 agreement and thereby to agree to relinquish certain rights they had to cash compensation from the sale of franchises and other income under their October 10, 1967 employment agreements and to accept in place of these rights, consider-

ation which included additional shares of Diners' common stock. They contend that the representations concerning the Continental takeover were false and that defendants knew that their representations created a false picture. Plaintiffs seek to recover damages allegedly sustained by them as a result of their relinquishment of their cash compensation for consideration which included restricted Diners' common stock.

In order for a plaintiff to recover damages for a violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10(b)5 promulgated thereunder, he must prove five elements.

First, he must show that the defendant made representations to him which were material.

Second, he must show that the representations were false.

Third, he must show that the defendant stated these representations with the intent to create a false picture for the plaintiff.

Fourth, plaintiff must show that he relied upon these misrepresentations.

Fifth, he must show that as a result he suffered monetary damages.

If you find that any plaintiff in this case has

established these five elements by a preponderance of the evidence, then your verdict will be for that plaintiff. If you find that any of these five elements has not been established by a plaintiff, then your verdict will be for the defendants as to that plaintiff. I will explain each of these elements to you in a moment.

Before doing so, however, I must inform you that I made a decision after the close of plaintiffs' case concerning plaintiffs' claim that they were induced to sell Fugazy Travel Bureau in October 1967 on the basis of representations concerning a Continental takeover by defendants. I concluded, as a matter oflaw, that there wasno reliance on the part of plaintiffs in October 1967 regarding the timing of the Diners' Club takeover by Continental and, further, that there were no material mis esentations made by the defendants prior to October 10, 1967 as to the specific date or time when the Diners' Club takeover by Continental would take place.

As a result, I have concluded that the plaintiffs failed, as a matter of law, to prove at least one of the elements of an action for violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10(b)5 promulgated thereunder. Thus, it is no longer within your province as triers of the facts to render a decision on plaintiffs'

claim that they were defrauded into selling Fugazy Travel Bureau in October, 1967.

I must impress upon you, however, that this decision on my part is to have no effect on your deliberations and your duty to render a fair and impartial decision on the claim of William D. Fugazy, Louis V. Fugazy, and Otto Marx, Jr., that in 1968 they were defrauded into relinquishing certain rights they had to cash compensation under their employment contracts for additional restricted shares of Diners' Club common stock. I have concluded that there are questions of fact concerning that claim that you, as the ultimate triers of the facts must decide. I will therefore charge you on the elements of a claim for violation of Section 10(b) of the Securities Exchange Act of 1934 and rule 10(b)5 promulgated thereunder as these elements relate to the claims of Willaim D. Fugazy, Louis V. Fugazy, and Otto Marx, Jr. under their employment contracts.

The first question for you to answer is: What, if any, representations were made by the defendants individually or by others acting on their behalf to the plaintiffs? You must determine whether or not representations concerning the takeover of Diners Club by Continental were made to induce plaintiffs William D. Fugazy, Louis V. Fugazy, and Otto

Marx, Jr., or any of them, to agree to relinquish their rights to cash compensation under their employment contracts. If you find that any defendant made representations to any plaintiff concerning a takeover of Diners'by Continental by November, 1968, you will next consider whether those representations were material. A material fact is one to which a reasonable man would attach importance in determining his choice of action in the transaction in question. That is, whether a reasonable person under similar circumstances would have considered the representations concerning the takeover of Diners' Club by Continental important in making an investment decision. If you find that none of the defendants made any representations concerning a Continental takeover of Diners'to any plaintiff, that the representations made were not material, your verdict will be for defendants. If, however, you find that any defendant, individually or acting with other defendants made representations concerning a Diners' takeover by Continental to any plaintiff and that such representations were material, you must next consider whether those representations were true or false. If you find that the representations concerning a Diners' takeover by Continental were true, your verdict will be for the defendants.

If, however, you find that the representations

concerning a Diners' takeover by Continental made by any defendant to any plaintiff were false, then you must decide whether or not that defendant made the representations with what is called under the law "scienter". If you find that the defendant you are considering had knowledge of the fact that the representations concerning the Continental takeover of Diners' created a false picture, then you will find that the defendant made the representations with scienter. It is not necessary,however, for you to find that the defendant actually knew that the representations concerning the Continental takeover were misleading or that the defendant actively intended to deceive or harm any of the plaintiffs in this case. If you find that the defendant you are considering had knowledge of the fact that the representations created a false picture, then you may find that the plaintiff to whom this representation was made has established his third required element for recovery under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10(b)5 promulgated thereunder.

If you determine that any defendant made a representation which was false and had knowledge of the fact that the representations created a false picture, you must determine whether the plaintiff you are considering relied among other representations upon the misrepresentations

concerning the takeover of Diners' Club by Continental in deciding to relinquish his rights to cash compensation for certain considerations which included additional shares of restricted Diners' Club common stock. In this connection you may wish to consider the background and experience of the plaintiffs, particularly Otto Marx, Jr.and William D. Fugazy.

You must next determine whether or not as a result of the misrepresentations made by any defendant, individually or acting with other defendants, any plaintiff was damaged. I will charge you now on the law of damages. Although the fact that I do so must not be taken as an intimation that you should find for the plaintiffs, or any of them. Whether a plaintiff is entitled to recover is for you, and you alone, to decide. If you find that a plaintiff is entitled to recover damages from a defendant, you are then to consider the amount of damages to be awarded to that plaintiff. The law requires that a plaintiff be compensated for his losses resulting from the violation by a defendant of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10(b)5 promulgated thereunder.

In this type of claim a plaintiff can recover only the difference between the value of what he gave up and the

value of what he received.

Plaintiffs allege that their damages are the difference between the value of their rights to cash compensation, which they gave up for restricted shares of Diners' Club common stock, and the price at which they ultimately sold the stock. Plaintiffs claim that they were damaged in the following amounts:

Otto Marx, Jr., $651,805.

William and Louis Fugazy, $325,885 each.

Defendants claim that the consideration received by plaintiffs included the cancellation of an indebtedness to Diners' in the amount of $180,352, a release from certain tax liabilities, cash in the amount of approximately $243,000, and a limitation on other liabilities, and that this exceeded the value of the rights to cash compensation from the sale of franchises and other income, pointing out that after September, 1968 only about 50 additional franchises were sold. Therefore, defendants contend that rather than being damaged plaintiffs profited from the September 1968 agreement.

If you find that the plaintiffs received less than they would have received had they not exchanged their rights to cash compensation for consideration which included additional restricted shares of Diners' common

stock, the difference between the value of what plaintiffs gave up and the value of what they received would be their damages.

On the other hand, if you find that the plaintiffs received as much as or more than they would have received had they not exchanged their rights to cash compensation, and therefore that plaintiffs were not damaged, your verdict should be for defendants on plaintiffs' first claim.

I turn now to the plaintiffs' second claim.

Plaintiffs also contend that defendant Diners' Club, Inc. breached paragraph 10.2(b) of the acquisition agreement dated October 10, 1967 by failing to promptly file a registration statement with the Securities and Exchange Commission and by failing to use its best efforts to cause the registration statement to become effective.

In order for plaintiffs to establish breach of contract, they must establish the following:

First, they must prove that there was an agreement.

Second, they must prove that there was consideration for the agreement.

Third, they must prove that there was a breach of a term of that agreement.

Fourth, they must prove that as a result of the

breach of the agreement they suffered monetary losses.

I charge you as a matter of law that there was an agreement and that there was consideration for the agreement. The questions, however, that you must determine as the trier of the facts arewhether plaintiffs have proved by the preponderance of the evidence that Diners' failed to meet its obligations under Section 10.2(b) of the acquisition agreement and plaintiffs suffered monetary losses as a result of defendants' failure.

Section 10.2(b) of the acquisition agreement provides that the Diners' Club, Inc. would promptly file a registration statement after receipt of notice from plaintiffs that they desired that Diners' Club register their shares and would use its best efforts to cause the registration statement to become effective.

Plaintiffs contend that Diners' failed to promptly file a registration statement as required under the agreement between the parties and that defendant failed to use its best effort to cause such registration statement to become effective.

Plaintiffs contend that they requested registration on April 16th, 1969 and that Diners' Club did not file the registration statement until August 28, 1969.

Plaintiffs contend that defendant should have

filed the registration statement on or about June 20, 1969 after Diners' audited financial statements for the fiscal year ended March 31, 1969 were available for inclusion in the registration statement.

Defendant Diners' contends that it used its best efforts to file and make effective the registration statement notwithstanding plaintiffs' failure and refusal to fulfil certain conditions precedent to such registration rights.

You must determine whether, in fact, Diners' promptly filed a registration statement. They say that they did. Plaintiffs say that they didn't.

Under the law "promptly" means without unreasonable delay.

You will recall I also referred to the term "best efforts." Under the law, Diners' "best efforts" obligation required Diners' to do everything that would reasonably have to be done to cause the registration statement to become effective so that in the normal course of events, Diners' best efforts would result in the registration statement becoming effective. Diners' best efforts obligation was not limited by circumstances or factors within its control, but rather was limited only by external causes over which Diners' would have had no control.

Plaintiffs contend that if Diners'had used its best efforts to cause the registration statement to become effective, the registration statement would have become effective approximately 70 days from its filing. The Court has taken judicial notice of the 36th Annual Report of the Securities and Exchange Commission which states that the average time between filing of a registration statement and the effective date duringthe fiscal year ended June 30, 1970 was 70 days. The taking of judicial notice by the Court of a fact is a finding that said fact is not subject to any reasonable dispute. However, whether or not the Diners' registration statement would have become effective within the average time, that is, 70 days, is a question for you to determine from all of the evidence in this case.

Diners' contends that the delay in registration was, in fact, caused by the plaintiffs. In this connection, you may wish to take into consideration that, although the plaintiffs formally requested the registration of those shares on April 16, 1969, the plaintiffs, during the next approximately six to eight weeks, advanced certain alternative proposals to avoid the necessity of filing a registration statement and that that may have resulted in a delay in the commencement of the preparation of the registration state-

ment. You may also take into consideration that defendant Diners' had the right to, and did, include in the registration statement other securities and that, in that connection, it was required to obtain information with respect to the holders of those securities, which may have resulted in a delay in the filing of the registration statement.

Diners' contends that plaintiffs were required as a condition precedent to the preparation of that registration statement, to advance to defendant Diners' an amount sufficient to reimburse Diners' for one-half of the expenses of that registration statement, and that the plaintiffs never made any such payment.

Defendant Diners' also contends that, notwithstanding that plaintiffs were required as a condition precedent to the preparation of that registration statement, to execute an indemnity agreement, plaintiffs refused to execute the indemnity agreement until August 24, 1969, just four days before the actual filing.

In determining whether or not defendant Diners' used its best efforts to cause the registration statement to become effective, defendant urges that comments from the Securities and Exchange Commission with respect to the registration statement were not received by Diners' until

approximately two months after the registration statement had been fled and that within two weeks thereafter defendant Diners' had transmitted to the Securities and Exchange Commission two letters of response to those comments and had attended a conference with the staff of the Securities and Exchange Commission in Washington to resolve those comments.

Diners' also of points to the testimony of William D. Fugazy, that there were monumental problems involved in causing the registration statement to become effective.

If you find that Diners' failed to promptly file the registration statement as required, your verdict will be for plaintiffs on that question. If you find, however, that Diners' promptly filed the registration statement, you still must consider whether or not Diners' used its best efforts to cause the registration statement to become effective.

If you find that Diners' breached its contractual obligations to plaintiffs by failing to promptly file a registration statement or by failing to use its best efforts to cause the registration statement to become effective, then you must determine what damages, if any, plaintiffs have suffered as a result of the breach. Under the law of

damages for breach of contract, a breaching party is to compensate or to indemnify the injured party for the damages that he has suffered; that is, to put him in as good a position as he would have been had the breaching party abided by its agreement. Damages exclude all speculation and are limited to compensation.

It is up to you to determine when the registration statement should have been filed and when, with the use of best efforts, the registration statement should have become effective and thus what damages, if any, plaintiffs suffered.

Plaintiffs' contend that Diners' should have filed the registration statement by June 20, 1969. As I have indicated they further contend that the registration statement should have become effective within 70 days from that date. Thus, plaintiffs contend that the registration statement should have become effective on August 29, 1969.

An exhibit in this case reflects that Diners' common stock closed on the New York Stock Exchange on that date at $23.50 per share.

Since plaintiffs sought a registration of 66,158 shares they contend that they could be expected to have received $23.50 per share in the public offering.

Otto Marx, Jr. was seeking to register 27,208 shares, for which he could have expected to have received $639,388 in the public offering. This is, of course, his contention.

Instead, Mr. Marx sold 23,484 of those shares at $13.50 per share and 3724 shares for $15 per share for a total amount of $372,894.

William and Louis Fugazy each sought registration of 16,539-1/2 shares. Thus, each of them could have expected to have received $388,678.25 in the public offering. These shares were all sold at $15 per share; William Fugazy received $248,092.50 from these sales, as did Louis Fugazy.

Thus, plaintiffs contend that William Fugazy's loss from Diners' breach was $140,585.75, as was Louis Fugazy's, less their registration costs. John Summerlin sought registration of 5,871 shares, from which he could be expected to have received $137,968.50 in the public offering.

He sold these shares at $15 per share, for a total amount of $88,065. Thus, plaintiffs contend that their losses were as follows: Otto Marx, Jr., $266,494; William Fugazy, $140,585.75; Louis Fugazy, $140,585.75; and John Summerlin, $49,903.50.

From these alleged losses, you should, if you reach this point in your calculations, deduct the registration costs which would have been borne by these plaintiffs.

You can find for the plaintiffs both on their claim that they were defrauded into relinquishing their rights to cash compensation for restricted shares of Diners' Club common stock and on their claim that Diners' breached

its contractual obligations to promptly file a registration statement and to use its best efforts to cause a registration statement to become effective.

These are not separate and distinct grounds for recovery. However, in the event that you do find for plaintiffs on both claims, then plaintiffs' claim for breach of contract must be reduced by those shares which plaintiffs acquired in return for relinquishing their rights to cash compensation. Otherwise, plaintiffs would be recovering damages on both claims for the same shares.

Thus, Otto Marx, Jr. sought registration of 3,724 shares of Diners' stock that he acquired in return for relinquishing his rights to cash compensation.

Similarly, William Fugazy and Louis Fugazy each sought registration of 1,862 shares that they acquired in return for relinquishing their rights to cash compensation.

Accordingly, if you find that defendants defrauded plaintiffs into relinquishing their cash compensation and Diners' failed to promptly file a registration statement and failed to use its best efforts to cause a registration statement to become effective, then plaintiffs Otto Marx, Louis Fugazy and William Fugazy allege that their breach of contract claim would be as follows: Otto Marx, Jr., $234,840; William Fugazy, $124,767 and Louis Fugazy,

$124,767.

Again, you should take into consideration and should deduct from any award of damages the cost of registration which the plaintiffs were obligated to pay under their agreement.

Since John Summerlin did not acquire any shares of Diners' Club common stock for relinquishment of cash compensation, his breach of contract claim would remain unaltered in the event you found for plaintiffs on both claims.

Diners' claims that it did not breach its contract, that it did, in fact, promptly file a registration statement, and that it did, in fact, use its best efforts to make the registration effective.

Diners' points to a number of exhibits, including correspondence between the parties, throughout the period from April, 1969 up through the fall and early winter of 1969, to support its allegations and defenses in connection with this claim.

Turning now to the defendants' counterclaims, the defendant Diners' Club claims that in connection with its acquisition of the Fugazy Travel Bureau in 1967 and the obligations undertaken in connection therewith, the plaintiffs made untrue statements of material facts,

omitted to state material facts, employed devices, schemes, and artifices to defraud, and engaged in acts, practices and a course of business which operated as a fraud and deceit upon Diners' Club.

In order for you to return a verdict for the defendant Diners' Club on this claim, you must find that the defendant has established by a fair preponderance of the evidence the five elements which I mentioned earlier when discussing plaintiffs' 10(b)(5) claim. The defendant must establish that the plaintiffs knowingly or in reckless disregard for the truth failed to disclose to Diners' any of the following facts:

1) That Fugazy Travel Bureau was insolvent and had been for the four years preceding the acquisition by Diners'; or,

2) Misrepresented to Diners' that the plaintiffs had entered into an arm's length transaction for the sale of the 342 Madison Avenue office, which included the principal portion of the New York City business, when the actual sale was to a company owned, operated and controlled by the plaintiffs, Travelco, which misrepresentation resulted in an overstatement of the net profits of Fugazy Travel Bureau in 1967 by approximately $250,000; or that the franchise program formulated by them was

viable when the plaintiffs knew, from their own experiences, that the obligations of the franchisees were so burdensome that it was not possible for the franchise system to work, and, knowing this, the plaintiffs actually instituted a policy not to have the franchisees make the required payments in order to perpetuate the franchises until sale of Fugazy Travel Bureau could be effected, or that the liabilities stated in the financial statements certified by Messrs. Marx, William Fugazy and Robert Phillips were true and correct when they knew that the liabilities were understated and, therefore, the profits for the nine-month period ending June 30, 1967, were overstated by at least $250,000.

3) A reasonable investor would attach importance to one or more of those misrepresentations and omissions in the circumstances in which they were made in determining whether or not to acquire Fugazy Travel Bureau and to undertake the obligations in connection therewith; and,

4) That a reasonable investor would attach importance to one or more of the omissions or misrepresentations, or that the plaintiffs engaged in a comprehensive scheme to defraud the defendants, or that Diners', in fact, relied on those misrepresentations in making its investment

decision, in order for Diners' to prevail.

Defendant Diners' urges that you take into consideration the evidence in this case concerning the condition of Fugazy Travel Bureau at the time it was sold to defendant Diners', the viability of the franchise program developed by the plaintiffs, and the interests of the plaintiffs in the office at 342 Madison Avenue.

If you find that no misrepresentations or omissions were made by the plaintiffs, or that such misrepresentations or omissions, if made, were reasonable when made, you may not return a verdict for the defendant.

Even if you find that those representations or omissions were knowingly and willfully made by plaintiffs to defendant, you may not return a verdict for the defendant unless you also find that a reasonable investor would attach importance to them in determining whether or not to acquire Fugazy Travel Bureau and to undertake the obligations in connection therewith.

Finally, even if you find that those statements were knowingly and willfully made by the plaintiffs to the defendant and that a reasonable investor would attach importance to them in making his decision, you may not return a verdict for the defendant, unless you also find that the plaintiffs engaged in a comprehensive scheme to defraud the

defendants, that a reasonable investor would attach importance to the omissions, or that this defendant, in fact, relied on the plaintiffs' misrepresentations.

If you find to your satisfaction that the defendant has established by a fair preponderance of the evidence all of the aforementioned elements of its claim, you must further find the extent to which the defendant was damaged, if at all. For this type of claim the defendant can recover the difference between the value of what it gave up and the value of what it received.

In determining the value of what the defendant gave up, you may take into consideration that the consideration transferred by the defendant Diners' to plaintiffs during the years 1967 and 1968 included approximately $4,220,260 worth of the shares of the Diners' common stock at its then market value, and approximately $2,500,000 in cash.

You may also take into consideration that in exchange for those securities and the cash, the defendant received Fugazy Travel Bureau, the franchise system to be operated by Fugazy Travel Bureau, and was obligated to and did employ the plaintiffs.

For this type of claim the defendant can also recover the direct consequential damages suffered by it

as a result of the plaintiffs' violations.

In determining the direct consequential damages suffered by defendant Diners', you may take into consideration that it lost $693,000 during the year ended March 31, 1969; $14,437,000 during the year ended March 31, 1970; $9,988,000 during the nine months ended December 31, 1970; and $9,891,192 thereafter.

As to the defendants' second counterclaim against the plaintiffs, defendants Diners' and/or Diners'/Fugazy Travel claim that the plaintiffs breached the fiduciary duties owed to Diners' and/or Diners'/Fugazy Travel by the plaintiffs in their capacities as officers and directors of those companies.

A director or an officer of a corporation violates his duty of trust to that corporation if he does not give to that corporation his undivided and unqualified loyalty, if he allows his personal interests to conflict with the interests of the corporation, or if he uses for his personal gain information obtained by him by virtue of his position with the corporation.

If you find that plaintiffs, or any of them, made their decisions as to the number of franchises that were sold by Diners'/Fugazy Travel on the basis of the personal benefits it would yield to them, and not strictly

on the basis of the best interests of the corporations, or if you find that the plaintiffs maintained a direct or indirect interest in the franchise office at 342 Madison Avenue during the time that they were officers and/or directors of Diners', or any of its subsidiaries, or if you find that the plaintiffs diverted business or opportunities of Diners' or any of its subsidiaries to any other entity for their own personal gain, or if you find that the plaintiffs concealed or willfully or recklessly failed to disclose to Diners' or any of its subsidiaries, during the time plaintiffs were officers and/or directors of Diners' or its subsidiaries, any information relating to the business or affairs of Diners' or any of its subsidiaries which, if known to Diners', might have resulted in increased earnings or decreased losses for Diners' or any of its subsidiaries, you may return a verdict for the defendants against the plaintiff who you find to have breached his fiduciary duties on this claim.

If you find to your satisfaction that the defendants have established by a fair preponderance of the evidence that any or all of the plaintiffs breached their fiduciary duties to the defendants, Diners' and Diners'/Fugazy, you must further find the extent, if any, to which the defendants were damaged.

For this type of claim, the plaintiffs would be liable to the defendants Diners' and/or Diners'/Fugazy Travel for any and all of the profits received by a plaintiff that flow from that plaintiff's violation of his fiduciary duties, for all losses suffered by Diners' and/or Diners'/Fugazy Travel as a result of those breaches, and for any and all compensation received by that plaintiff from Diners' and/or Diners'/Fugazy Travel.

In determining such damages, you may take into consideration that Diners'/Fugazy Travel suffered losses in the amount of approximately $35,009,192; that the defendant Diners' paid to the plaintiffs in the aggregate of approximately $400,000 in salaries and $743,750 in franchise fee compensation; and that Diners' issued to the plaintiffs in exchange for the plaintiffs' cash compensation, rights, shares of Diners' common stock then valued at $1,862,300.

Plaintiffs deny the allegations of the counterclaims and assert that they made no false representations to defendants and assert that Diners' losses were attributable solely to Diners' excessive expansion, poor management, and bad business judgment.

In short, they claim that no false representations and no failures to disclose were proved by defendants

Diners' or Diners'/Fugazy Travel, Inc.

I would note that any recital of contentions or evidence by me is not binding on you, since it is your recollection alone which is governing and supreme. The facts have been set forth at considerable length by both counsel in their summations, and I shall not go into them. I think the facts are clear in your minds. You have heard the witnesses, you have paid strict attention to their testimony, and you know from their lips what they say happened.

The documents which are in evidence are available to you for your study and consideration. It is for you to decide on the evidence presented and the rules of law I have given you whether plaintiffs, or any of them, are entitled to recover from the defendants, or any of them, or whether the defendants, or any of them, are entitled to recover from the plaintiffs, or any of them.

If you decide a party is not so entitled, you need go no further. You will return a verdict on the questions submitted as instructed in the special verdict form, which I will be handing to you in just a few minutes.

Only if you find by a preponderance of the evidence that all of the elements of a plaintiff's claim against a defendant, or a defendant's counterclaim against

a plaintiff or defendant on the counter claim have been established shall you consider the question of damages.

You are to follow the law as I set it forth in this charge. Any verdict that you give here must be unanimous. I would like to point out that you should not enter the jury room with any preconceived pride of opinion; you should not be unwilling to be convinced by an intelligent argument with your fellow jurors.

Each juror, of course, has to answer to his own conscience; each has to decide the case for himself or herself. But in doing so, you should be willing to consider the views of your fellow jurors and talk it out and try your best to reach a unanimous agreement.

As I have indicated, both the testimony and the exhibits will be available to you. In addition, if you wish to hear any portion of my charge, that will be read back to you at your request.

I will close by saying that this is an important case. Each case is important to the parties who are concerned with it. It is important to the plaintiffs and to the defendants, and it is your obligation to decide it solely on the evidence and on the law as I have given it to you in this charge.

As I said before, I have prepared a form of

verdict which contains six separate questions. I will now read the questions to you. You will take the form into the jury room and depending on how you determine the case, the answers on the form will be made accordingly.

"PLAINTIFFS' FIRST CLAIM"

1. Did any of the defendants fraudulently induce plaintiffs Otto Marx, Jr., William D. Fugazy, or Louis V. Fugazy to relinquish certain rights they had to cash compensation under their October 10, 1967 employment agreements in exchange for consideration which included additional restricted shares of the Diners' Club, Inc. common stock? Answer yes or no. _____

2. If your answer to question 1 "no," your verdict on plaintiffs' first claim is for defendants and you should proceed to question 3. If your answer to question 1 is "yes," state which defendants, individually, or acting with other defendants, defrauded which plaintiffs, and the amount of damages, if any, sustained by each plaintiff:

Defendants:

The Diners' Club, Inc. _____

Diners'/Fugazy Travel, Inc. _____

The Continental Corp. _____

The Continental Insurance Co. _____

Plaintiffs:

Otto Marx, Jr. _____ Damages: $_____

William D. Fugazy _____ Damages: $_____

Louis V. Fugazy _____ Damages: $_____

"PLAINTIFFS' SECOND CLAIM"

3. Did the Diners' Club, Inc. breach paragraph 10.2(b) of the acquisition agreement dated October 01 1967, by failing to promptly file a registration statement with the Securities and Exchange Commission or by failing to use its best efforts to cause the registration statement to become effective? Answer "yes" or "no."

_____

4. If your answer to question 3 is "no," your verdict on plaintiffs' second claim is for defendant Diners' Club and you should proceed to question 5. If your answer to question 3 is "yes," state the amount of damages, if any, sustained by each plaintiff:

Plaintiffs:

John V. Summerlin, Jr. _____ Damages: $_____

Otto Marx, Jr. _____ Damages: $_____

William D. Fugazy _____ Damages: $_____

Louis V. Fugazy _____ Damages: $_____

"DEFENDANTS' COUNTERCLAIM"

5. Did any of the plaintiffs or additional

defendants on the counterclaim fraudulently induce the Diners' Club, Inc. to enter into the October 10, 1967 agreements or breach any agreements among the parties to violate any fiduciary duties to Diners' Club, Inc. and Diners'/Fugazy Travel, Inc., now known as Diners' World Travel, Inc.? Answer yes or no. _____

6. If your answer to question 5 is "no," your verdict on defendants' counterclaims is for plaintiffs and you need go no further. If your answer to question is "yes," state which plaintiffs or additional defendants on the counterclaims defrauded defendant the Diners' Club, Inc. or breached any agreements among the parties or violated any fiduciary duties owed to the Diners' Club, Inc. and Diners'/Fugazy Travel, Inc. now known as Diners' World Travel, Inc. and the amount of damages, if any, sustained by each defendant:

Plaintiffs and Additional Defendants on the Counterclaims:

Marx & Co., Inc. _____

John V. Summerlin, Jr. _____

Otto Marx, Jr. _____

William D. Fugazy _____

Louis V. Fugazy _____

F.T. Ventures, Inc. _____

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Defendants:

The Diners' Club, Inc. _____ Damages: $_____

Diners'/Fugazy Travel, Inc. _____ Damages: $_____

At this time I have completed my charge and I will see counsel in the jury room. The jury will please wait in the box, and I would suggest at this time that the two alternate jurors go back to the jury room and reclaim any property they have and that they bring it back to the courtroom.

(In the robing room.)

THE COURT: Are there any exceptions to the charge or any requests for supplemental instructions?

(A discussion was had off the record.)

THE COURT: Yes, Mr. Fredericks?

MR. FREDERICKS: Your Honor, as we have agreed off the record, a charge with respect to causal relationship between damages and the claim of the parties.

In addition, your Honor, I am going to request a general charge, and your Honor has off the record agreed that we will get a general charge, on the jury's right to weigh the credibility of documents.

I will request, your Honor, a charge on the expert witness, which your Honor indicates that you will not give me, since you feel you have properly covered it

during the course of the trial at the time that the expert witness testified.

I would also request a charge to the extent that under the law it is the responsibility of Diners' to file a registration statement that complies with the disclosure and other requirements of the Federal Securities Law. That charge, I believe, is properly set forth in our requests to charge on page 10 with the appropriate authorities to support that request, specifically, Boruski versus Division of Corporate Finance of the United States Securities and Exchange Commission, decided in this Court in 1971.

THE COURT: I will rule on your four requests as follows:

I will grant your first request and would charge the jury:

"In connection with establishing damages it is a party's burden to prove a causal relationship between its claim of damages and the activities of the adverse party."

In addition, I will supplement my charge by charging:

"In addition to weighing the testimony of witnesses, which I mentioned during my main charge, you should also weigh each document which you consider during your deliberations."

Regarding your request relative to expert testimony, I suggest that I gave that charge during the course of the trial and I believe the jury has now been sufficiently charged on that matter.

Regarding your request that I charge that under the law it was the responsibility of Diners' to file a registration statement that complied with the disclosure and other requirements of the Federal Securities Laws, while I accept that proposition of law, I do not believe that such a supplement to my charge is necessary in the context of this case.

Therefore, I will grant your first two applications, and for the reasons given I will decline to supplement the charge on a matter of expert testimony and on the matter of the responsibility of Diners' Club as set forth in Boruski.

As I said with reference to that, I believe Boruski to be the law; I do not believe it to be helpful to my charge to add that request, and, therefore, I decline to give it. You have your exceptions.

I would suggest only on the latter matter, which is the Boruski request--

MR. FREDERICKS: I agree, and those requests which have been denied by the Court--

THE COURT: By virtue of not having been included in the Court's charge? Is that what you are saying?

MR. FREDERICKS: That would not be four. I have just asked for certain charges, two of which have been denied me, and as to those I would like to maintain my exception.

THE COURT: You want to charge on expert witnesses?

MR. FREDERICKS: No.

THE COURT: So really it is just one, the one about Boruski.

MR. FREDERICKS: Yes.

THE COURT: Very well. The exception then, so the record is clear, is as to the Court's declining to charge under the law it was the responsibility of Diners' to file a registration statement that complied with the disclosure and other requirements of the Federal Securities Laws.

The Court's reason for not giving that particular request to charge has already been set forth, and I will not repeat it. You have your exception on that one request.

Is there anything further, Mr. Fredericks, regarding the charge?

MR. FREDERICKS: No, your Honor.

THE COURT: Turning now to the defendants, Mr. Santora?

MR. SANTORA: Only to repeat, your Honor, our discussion off the record wherein I requested in respect to your Honor's charge concerning plaintiffs' first claim to include in the listing of consideration given to the plaintiffs the 38,200 odd shares of Diners' stock, wherein your Honor indicated it was not necessary to supplement the charge at this time, but should another request come out from the jury, your Honor will supplement it at that time in this regard. That is my only request.

THE COURT: On that I would point out that I stated to the jury that any recital of contentions or evidence by me was not binding upon the jury, since it was the jury's recollection which governed. I believe I spoke to the matter of the stock at another time in my charge, and I will tell you now if the jury does make a request regarding the consideration given, if you will remind me at the time we are preparing a response, I will include the stock at that time.

Is there anything else which you have in the way of either exceptions to the charge or requests for supplementary instructions beyond that to which you already

addressed yourself?

MR. SANTORA: No, your Honor.

THE COURT: Very well.

(Proceedings continued in the courtroom.)

THE COURT: Ladies and gentlemen, before you leave the courtroom to begin your deliberations I wish to supplement my main charge with two further instructions:

The first is that in connection with establishing damages, it is a party's burden to prove a causal relationship between its claim of damages and the activities of the adverse party;

Two, in addition to weighing the testimony of witnesses, which I mentioned during my main charge, you should also weigh each document which you consider during your deliberations.

I have now supplemented my charge. I hand the verdict form to your forelady and note that copies have been furnished to and are in possession of counsel.

Miss Kruger, does the jury have paper and pencils?

THE CLERK: The marshal has, yes, sir.

THE COURT: At this time I will excuse the jury and direct them to proceed to the jury room after we have sworn the marshal, and at the point they enter the

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(The jury took its place in the jury box at 6:35 p.m.)

THE COURT: Miss Cruger, will you please proceed.

(The clerk called the roll of the jury.)

THE COURT: Madam Forelady, have you agreed on a verdict?

THE FORELADY: Yes.

THE COURT: We will turn to the plaintiffs' first claim.

THE CLERK: Did any of the defendants fraudulently induce plaintiffs Otto Marx, Jr., William D. Fugazy or Louis V. Fugazy to relinquish certain rights they had to cash compensation under their October 10, 1967 employment agreements in excahnge for consideration which included additional restricted shares of The Diners' Club, Inc. common stock? Yes or no?

THE FORELADY: The jury concurred no.

THE COURT: We go now to question 3.

THE CLERK: Did the Diners' Club, Inc. breach paragraph 10.2(b) of the acquisition agreement dated October 10, 1967 by failing to promptly file a registration statement with the Securities and Exchange Commission or by failing to use its best efforts to cause the registration

statement to become effective?

Yes or no?

THE FORELADY: The jury concurred yes.

THE COURT: If your answer to Question 3 is yes, state the amount of damages, if any, sustained by each plaintiff.

THE CLERK: John V. Summerlin, Jr.

THE FORELADY: John V. Summerlin, Jr., $44,000.

THE CLERK: Otto Marx, Jr.

THE FORELADY: Otto Marx, Jr., $240,000.

THE CLERK: William D. Fugazy.

THE FORELADY: William D. Fugazy, $124,500.

THE CLERK: Louis V. Fugazy.

THE FORELADY: $124,500.

THE CLERK: Question 4: Did any of the plaintiffs or additional defendants on the counterclaims fraudulently induce The Diners' Club, Inc. to enter into the October 10, 1967 agreements or breach any agreements among the parties or violate any fiduciary duties owed to The Diners' Club, Inc. and Diners/Fugazy Travel, Inc. now known as Diners World Travel, Inc.?

Answer yes or no.

THE FORELADY: The jury concurred no.

THE COURT: I believe that would complete the jury verdict. I would at this time ask if either counsel wishes to have the jury polled?

MR. FREDERICKS: The plaintiffs do not wish to have the jury polled.

MR. SANTORA: Yes, your Honor.

THE COURT: I will ask each of you if this is your verdict as it stands recorded --

(The jury was polled.)

THE COURT: Is there anything further before the Court discharges the jury?

Mr. Fredericks?

MR. FREDERICKS: No, except that I ask the Court when it expresses its thanks to the jury, to express the thanks of the plaintiffs.

THE COURT: Mr. Santora?

MR. SANTORA: The defendants ask for a judgment, notwithstanding the verdict, with respect to the defendants' first claim and with respect to the defendants' counterclaim, and also I would like to thank the jury for the time they gave up in the tough three weeks that it was.

THE COURT: Very well.

MR. SANTORA: I hope I did not misspeak.

I ask for a directed verdict in favor of the

defendants with regard to the plaintiffs' second claim. I may have said defendants.

THE COURT: But you have heard the polling of the jury, and that is complete and that is as satisfactory as possible?

MR. SANTORA: Yes.

THE COURT: At this time I wish to thank and discharge the jury.

Before I do so, I will ask your forelady to hand up to Miss Cruger the verdict form, and Miss Cruger will distribute to each of you your cards.

You have served loyally and faithfully for a period of three and a half weeks at considerable discomfort, I am sure, to yourselves, taking time out from your daily lives, in all kinds of weather, and at all times you addressed yourself to your job faithfully and diligently, appearing promptly, listening to long hours of testimony. I am certain that by your deliberations, which stretched over a day and a half, or a little more than a day, any way, you gave the various matters your most careful attention, your most careful consideration.

The Court can ask no more of its fellow citizens. I just want to say on my own behalf, on behalf of the Court in which I serve, and on behalf of counsel, although I never

comment on whether I agree or disagree with the jury's verdict, but this jury was a most diligent and conscientious jury, and you leave here with the thanks of the Court.

I want to come down and just say to each and every one of you "Thank you" on my own behalf and on behalf of the Court. I appreciate very much the time that you took. Now you can get back to your families, and I am sure they will be glad to see you again.

(The Court shakes the hand of each of the jurors.)

MR. FREDERICKS: Again I would like to personally thank you all for your time and attention.

MR. SANTORA: Thank you.

(Jury discharged.)

THE COURT: Mr. Santora?

MR. SANTORA: Your Honor, I understand that I have ten days following the entry of judgment to file a written motion in this regard. I would like to make an oral motion now, if your Honor would permit me to do so.

With respect to the claim, the 1969 claim, which is the second claim of plaintiffs, I feel that the jury's verdict should be overtunred by your Honor on the basis of the contracts themselves, the testimony in the record, the evidence in the record, which clearly shows that conditions

precedent to the filing of the registration statement were not performed by plaintiffs, and as a result, until these requirements were resolved, which was August 24 at the earliest, and in one case August 26, as a matter of law the filing of the registration statement on August 28st must be considered to be a prompt filing.

THE COURT: Well, they still have the best efforts point, I would think. And there was, I recall, this memorandum back and forth which we discussed, between Faunce and Herd, and so on, and it does seem to me that there was enough in the record for the jury to find the Diners' Club didnot use its best efforts, even if they filed promptly, and I think a verdict there would still be warranted.

MR. SANTORA: I was taking it one step at a time. It seems to me from the evidence in the record and the undisputed failure of the plaintiff to perform two conditions precedent -- I won't list them all now; I will list them in our written papers -- but turning to the obligation in paragraph 10.2(b), two aspects were clearly not performed until August 24th and August 26th. It is clear that Diners' Club had no obligation to file the registration statement until those matters had been resolved. The resolution of those matters on August 24th and August 26th preclude in my view as a matter of law any finding that

a filing four days afterwards, or in one case two days after wards, was not a prompt filing.

Now, with respect to the best efforts to register and make effective we then turn to the fact that upon the filing of August 28th, there were comments from the Securities and Exchange Commission which precipitated the necessity of the next action that Diners' Club could take, and that didnot come until October 31st, a period of some two months, which in and of itself will take the effectivene of the statement from out of the average figures of 70 days, including the 70-day figure that Mr. Friedman testified to.

I am suggesting that there was no way that this statement could become effective because the comments had not come from the Securities and Exchange Commission; the evidence in the record shows letters written and trips made to Washington in November, and on November 18th a lette from Mr. Marx which indicates agreement to withdraw the registration statement in return for alternative considerati the maintaining a bank balance in the amount of $250,000 or $300,000. I think at this point as a matter of law there can be no finding that best efforts were not used.

I would also like to point out the admission of one of the plaintiffs himself, who was a director of the

defendant Diners' at that time, to the effect that the tasks were monumental and efforts were made by Diners' to comply with the Securities and Exchange Commission requirements. This testimony was in a pretrial deposition and it was sworn to by Mr. Fugazy and read into the record.

I think as a matter of law a finding that best efforts were not used in those circumstances is against, not only the weight of the evidence, but against any possible finding from the evidence in this case and precluded by the contracts.

I would also like to point out with respect to the best efforts situation that that could not possibly be triggered until the filing time, I think, as a matter of fact, until the August 28th filing, which in my view was under the undisputed facts in this case completely prompt, because of the fact that the plaintiffs only complied or their agreement was met on those points within those two days, that at the very latest you would have to start computing even the 70-day period from August 28th.

Now, that argument, I think, directs itself to both the question of best efforts and also the computation of damages, and I think as a matter of law if the Court accepts that August 28th was a prompt filing based on the plaintiffs' failure to sign the indemnity and to attend to the

* * * * *

man had no claims against him. There is a substantial claim. He had it on the eve of the Diners' acquisition.

The second point is that this certainly goes in this very crucial time period to Mr. Marx's ability or, in fact, any possibility that he could have lied to Mr. Fugazy on any of these 10(b)(5) representations, when he had this kind of a claim against him arising out of what it arose out of, which was the selling of something that is priced higher than it really is.

MR. McKAY: Your Honor, a foundation is being laid for a suit by the Fugazy Travel Bureau against Tower arising out of the purchase by Mr. Marx of the company in 1963 to which Mr. Fugazy has testified that he was the principal negotiator. There was a fraud claim, your Honor.

We have not yet introduced into evidence any complaint in that action. That fraud claim was settled and Tower, since it was indemnified by the Fugazys for representations made to them, assigned the fraud claim to Mr. Marx.

MR. SANTORA: Against Fugazy.

MR. McKAY: If Mr. Fugazy was the principal asset of this company and it was sold to Diners', we want to know what kind of a person Mr. Fugazy was. The fact

that a fraud suit against Mr. Fugazy by Mr. Marx was not revealed to Diners' and that Fugazy was going to be operating Diners' Company--

MR. TOLAN: Your Honor, I think that the laboring law here has been laboring so long. It has been demonstrated to me, the tangential nature of this thing, they are trying to say that what happened in 1963 has somewhat relevancy on whether or not something occurred in 1967.

THE COURT: You have an application here because you also have their counterclaim in which they argue that the assets and the value of Fugazy was unconscienably padded.

What they are saying perhaps also is that this will demonstrate that not only did Fugazy have no net worth itself, but that the person who was represented as having been successful was far from it, and, as a matter of fact, had been involved in the controversy on the same subject before, which was material, which was omitted from disclosure, and perhaps what is sauce for you is also sauce for them.

I think I have to take the counterclaim into account when I look at this and, as far as I can see, it would be in the interest of justice to put everything else before the jury. I think there is enough here to put in.

Therefore, I am going to overrule the objection and permit this agreement of February 26, 1963 and the related assignment in 1967 to be received.

I think to take one, like the assignment, for example, without the other would be inappropriate, and under the circumstances I am going, for the purpose of completeness, to permit both documents to be received.

If you wish to state your objections on the record further, you may do so.

MR. FREDERICKS: Your Honor, it is not my habit to take exception with the ruling of the Court, but I am looking at these two documents for the first time and they are not on the pre-trial list. They have never been heretofore produced.

THE COURT: Let's look at that for a moment.

MR. FREDERICKS: Let me put that aside, your Honor. I am concerned with raising collateral issues.

In paragraph 2 of this agreement there contains release by Tower. It says, "Tower releases Fugazy, Louis and William, from any and all claims, demands, past, present or future."

This document is dated 1963. We now have a successor in interest to Tower entering an assignment in 1967--I think it's '67, the second agreement, whatever the

general public?

A That was discussed, but there was no final determination.

Q Do you know what numbers were suggested, if you recall?

A Yes. The numbers were in the $8 to $10 range in view of the fact that another travel agency had been sold at $8.

Q Did you have any discussions about registering those new shares?

A Yes, we did.

Q Did you have any discussions with any of the underwriters about any problems that might arise in trying to register the new shares of Fugazy Travel?

A No, not that I recall.

Q Did you believe in '67, Mr. Marx, that it was possible for you to get SEC approval, approval of the Securities and Exchange Commission, for the registration of new shares in Fugazy Travel?

A I didn't think there was any doubt about it.

THE COURT: Will you tell the ladies and gentlemen of the jury what is required to obtain SEC approval or what you knew to be required to obtain SEC approval in 1967?

THE WITNESS: The main thing that the SEC demands then and today is full disclosure. Practically any securities can be sold to the public as long as the public is informed of all the good things and all the bad things. I don't know whether you ever had the opportunity to see a prospectus, but on the front of speculative issues they specify that, that there is a risk. They also in the first two or three pages of this document that you get at the time of a purchase, specify exactly what the risks are and what competition could do or not do.

So that in order to register you have to have a history of the company and an accurate description of what the money is going to be used for, the pro forma or the situation once the money was raised, the condition of the company in detail at the time of the raising, five years annual figures, going back five years, and any current figures which did not have to be audited.

The five years figures had to be audited. If you had a three month period or a six month period, those could be unaudited figures. In most instances you had to have a certificate of an accounting firm.

In general, that is what you had to disclose.

THE COURT: When you say "audit," that would mean an examination by an independent firm of certified

public accountants?

THE WITNESS: That is correct, sir.

Q Mr. Marx, you say that you have disclosed the figures for five years? You are talking about the balance sheet assets and liabilities, also, financial performance, the earnings or losses over the period you have described, five years?

A Correct.

Q In the financial statements that you would have had to provide to the Securities and Exchange Commission, were they all required to be certified by independent auditors?

MR. FREDERICKS: We have now moved from Mr. Marx's understanding of what is required by the Securities and Exchange Commission. I object, unless that question is phrased properly.

THE COURT: I think there is a form objection. Perhaps we could stay with Mr. Marx's understanding. He has answered that question anyway.

But since this is a matter which is not within the common experience of all of us, I think you can explore it further with a proper question.

Q Mr. Marx, did you discuss with any of the underwriters the requirement or the necessity of providing for

the years in question that had to be covered for the Securities and Exchange Commission a registration statement, the need to have statements, financial statements that were prepared or certified by an outside independent auditor?

A Yes, I did.

Q Do you know whether or not in 1967 you had such certified statements for the previous five years?

A Yes, we did. We had three years, and there was the necessity for this type of statement, but we did have five years.

Q I'm sorry?

A Well, this type of statement, you had to have three years, but I said we did have five years.

Q Well, did you have in '67 a certified financial statement for the year 1965?

A Yes, we did.

Q Well, do you recall hearing from the J.K. Lasser people that they could not certify the financials of Fugazy Travel for the year 1965?

A I don't recollect that.

Q By the way, a moment ago you mentioned that you were not impressed by the management of Diners'. Can you tell us briefly who it was that you thought was poor

However,one thing that did come out was that it would be a 100 per cent takeover by Pierre Busetti. The company was offered on that basis.

Q Now, when you met with Mr. Fugazy was anyone else present?

A The first time, only when we first met, and I believe, as I said, in a lawyer's office, or where I was introduced to him, and a day or so later at that time we met again locally in the Hotel Biltmore area.

Q Well, do you recall what you said to Mr. Fugazy and what Mr. Fugazy said to you?

THE COURT: The first occasion.

A Well, the first occasion was an exploratory meeting about the travel business in general. We were kind of trying to get a feel--

THE COURT: Not what you are trying to do or what he was trying to do. We got to find out what happened, and, therefore, we ask you to tell us what was said.

We know that this happened many years ago and you may not know the exact language, but you can give us the substance of each person's statements, what they said in words or substance. That will be sufficient.

THE WITNESS: Your Honor, my recollection of the discussion that took place was a discussion about the

travel business and about Pierre Busetti's operations and about Fugazy's operations and franchising concepts, et cetera.

Q Did you say anything to Mr. Fugazy at that time about the travel business and the operations of Fugazy Travel?

A Yes, I recall saying that I did not like the figures that the balance sheet showed.

MR. FREDERICKS: Your Honor, I am going to object to this.

THE COURT: Sustained. Strike it. The jury will disregard it.

What, if anything, did Mr. Fugazy say during this conversation, other than a general discussion of the travel business and franchises?

THE WITNESS: That was pretty much the substance of the meeting. We didn't spend very much time together because there were to be subsequent meetings with Mr. Marx and our attorneys, et cetera.

THE COURT: Were any papers exchanged at that meeting or was it strictly conversation?

THE WITNESS: Strictly conversation.

MR. SANTORA: I would like to inquire on the sustaining of the objection on the balance sheets. I

think that is relevant, certainly, on the defense counterclaim.

THE COURT: No, if he has the balance sheet that was proffered originally or you have it, I will entertain that. But that is the way it should be done.

Q You had a second meeting with Mr. Fugazy, Mr. Piscatella. Will you tell us when that occurred?

A Well, shortly thereafter I met with Mr. Fugazy in his offices at Madison Avenue, which was two or three days later.

Q Can you tell us, Mr. Piscatella, without characterizing to the best of your recollection what you said to him and what he said to you?

A Well, I said to him I wanted to see his operation. We discussed his computer situation that he had there and the style of his business, which was heavily engaged in those days in commercial account traffic.

As a matter of fact, we had similar accounts, we had the same company accounts, Westinghouse in Pittsburgh and he had them in New York. So we had a piece of those particular accounts. We discussed how they were handled and what the future of the business would be and we got into a discussion about the financial situation as to whether or not we could be given a certified state-

ment or a more up-to-date statement for evaluation.

Q Do you recall anything else that you said to him or he said to you at that time?

A Yes. We discussed the franchise concept that was created at that point in time.

Q What happened next, Mr. Piscatella, if anything?

A We were given an unaudited balance sheet, of which I can only remember the substance of what it showed, but it prompted still an additional meeting between Miss Shelly Sandoni and myself, Mr. Marx, and I believe we had an attorney present there from White & Case, who represented Mr. Sandoni, and I believe Mr. Marx has his brother, Henry Marx, who was an attorney, also there, and I believe Mr. Summerlin, John Summerlin attended, and again this meeting occurred in Mr. Marx's home in Central Park East.

THE COURT: I don't know any Central Park East.

THE WITNESS: It is on 88th Street.

THE COURT: That is Fifth Avenue?

THE WITNESS: Yes.

Q Now, you said you had this meeting at Mr. Marx's house with Mr. Sandoni there and yourself and Mr. Summerlin.

A I believe Mr. Summerlin was present.

Q Mr. Marx had a lawyer there?

MR. FREDERICKS: Your Honor.

THE COURT: You are repeating something that all of us heard two minutes ago. Let's move on.

Q Do you know how long that meeting lasted?

A I don't recall, but I would say no more than an hour, an hour and a half.

Q Do you recall again without characterizing as best you can recall what was said at the meeting by yourself, Mr. Marx, or other people who were there?

A Yes. This was a negotiating type meeting from the balance sheet that was presented to us, and we were perfectly--

THE COURT: No, not what you are thinking, but if you said something.

THE WITNESS: We said--

MR. FREDERICKS: Who is "we," please?

THE WITNESS: Mr. Piscatella and Mr. Sandoni.

MR. FREDERICKS: Two people can't talk simultaneously. Can you see if you can break it up?

THE WITNESS: Well, Mr. Sandoni did most of the talking. I gave Mr. Sandoni my evaluation of the particular figures involved, and so that if I say "we said," please think that it is Mr. Sandoni mostly saying it.

But the essence of what was said--and I can't give it to you verbatim--is that we would be willing to buy the Fugazy Travel Bureau, that we would take the assets and no liabilities of the company and the Fugazy name, and that we would hire Mr. Fugazy as a consultant for a period of three years or thereabouts to carry on in the fashion that he had been.

So, as a result the essence of a deal was constructed. However, we asked for a more up-to-date reading of the balance sheet that perhaps could be analyzed a little bit better, and Mr. Marx indicated to us that he would try to get one to us as soon as possible and that a deal could be constructed.

However, there was one thing that Mr. Marx objected to at this point in time. I believe there was a long term note of Mr. Marx shown on the balance sheet which indicated he was the guarantor of a million dollar note, and he wanted that note transferred into Pierre Busetti, and I objected personally to accepting that particular note, and that we would go ahead based only on liabilities and assets as they would be struck one against the other with a concrete offer being made, we would absorb the deficits, and this is what has gone out in future memorandums.

Q Can you tell us what, if anything, happend after that meeting, Mr. Piscatella?

A Well, after that meeting we were given in my office of Pierre Busetti a memorandum prepared by the Fugazy Travel Bureau. I don't know who prepared the memorandum, but I assume their attorneys or someone prepared it.

MR. FREDERICKS: I move to strike.

THE COURT: Tell us what you assume. A memorandum was prepared?

THE WITNESS: And I believe it was delivered to my office by Mr. John Summerlin. The memorandum--do you want me to say what is in the memorandum?

THE COURT: No.

Q Now, Mr. Piscatella, I show you a document which is marked Defendants' Exhibit H for identification. I ask you, sir, if you recall ever having seen that document before.

A Yes, that is it.

Q Will you please tell us what it is.

MR. FREDERICKS: Your Honor--

THE COURT: It is a memorandum. We know that. I don't want him to read from it or characterize it.

That was delivered to you by Mr. Summerlin?

THE WITNESS: I believe Mr. Summerlin delivered

it. I am just recalling, because Mr. Summerlin and I had several meetings back and forth at this point in time at which papers were exchanged and I believe he delivered this memorandum to me.

Q Now, Mr. Piscatella, I show you documents entitled H-2, H-3 and H-4. I ask you if you can identify those?

A Yes, I can identify H-2, yes, H-3, yes, H-4, yes. They have my handwriting on them.

Q Do they all or just one of them?

A Two of them.

Q Which ones, please?

A H-2 has my name in my handwriting; H-4 has some notations I have made, again in my handwriting. There is no notation on H-3, but I seem to recognize the document.

Q Do you know how it was that you came to see those documents?

A I don't recall. There may or may not have been with this particular memorandum, but I'm not sure.

Q Did you discuss either of those documents, Exhibit H-2, H-3, H-4 with anyone, sir?

A Well, I certainly discussed them with Dr. Frankolini of my company and I discussed them with our attorney, Mr. Sandoni's attorney who was representing us,

and I recall that I have had several questions about some of the figures that were stated.

Q Is there anyone else that you can recall that you discussed the memorandum or those financial statements with?

A I don't recall. I could possibly have had a discussion with either Mr. Summerlin or Mr. Fugazy about it, but I don't recall.

Q Do you recall when that memorandum was delivered by Mr. Summerlin?

MR. FREDERICKS: Your Honor, I'm going to object to that question as leading in the first instance and it states a fact not conclusively in evidence.

This witness said he was not sure.

THE COURT: Let me ask the witness.

Do you have a recollection of how you obtained H for identification, that is, the memorandum?

THE WITNESS: Yes. I believe that was delivered to me at my office by Mr. Summerlin. That is my recollection.

THE COURT: When?

THE WITNESS: Oh, somewhere along about May of 1966.

Q Do you recall discussing the memorandum with

Mr. Summerlin at the time he delivered it?

MR. FREDERICKS: Objection, your Honor, leading the witness.

THE COURT: Sustained.

What, if anything, happened on the occasion when Mr. Summerlin delivered the memorandum to you?

THE WITNESS: Well, my recollection on the day that this memorandum was delivered, if I recall it correctly, Dr. Frankolini was also present in my office and we discussed briefly this particular memorandum.

THE COURT: You and Dr. Frankolini?

THE WITNESS: Yes, and perhaps with Mr. Summerlin. I am not sure.

THE COURT: Do you recall that or not?

THE WITNESS: I recall Dr. Frankolini and I together reviewing this, but I don't recall discussing it with Mr. Summerlin, but I am sure we must have said something.

THE COURT: The jury will disregard the last part of the answer.

MR. SANTORA: Which part?

THE COURT: "But" to the end of the sentence.

Q Mr. Piscatella, I show you a document which is entitled Defendants' Exhibit H-1 and ask you if you have

ever seen that before?

A Yes. As a matter of fact, I think I am the author of this myself and our attorney, yes.

Q Do you recall when you prepared that?

A Sometime in May or early June of 1966.

Q Did you discuss that--

MR. FREDERICKS: Objection, your Honor.

THE COURT: Don't lead.

Q What, if anything, did you do with that document, Mr. Piscatella, after you prepared it?

A After having cleared it with Dr. Frankolini and Michele Sandoni and our attorneys I had it delivered to Mr. Otto Marx and it was actually in counter to this memorandum prepared by--

MR. FREDERICKS: Objection.

THE COURT: Yes. You had it delivered to Mr. Otto Marx. I think that responds to the pending question. We will strike anything after that.

Next question.

Q When you delivered that to Mr. Marx, what, if anything, happened?

A Well--

THE COURT: You didn't deliver it to Mr. Marx yourself, did you?

THE WITNESS: No, I had it delivered by messenger.

THE COURT: After you had it delivered to Mr. Marx, what, if anything, happened?

THE WITNESS: Well, this created some more discussions and negotiations with Mr. Marx.

MR. FREDERICKS: I move to strike, your Honor, it created.

THE COURT: The word "created" is not artistic, but I think the gist of it is that after you had this document delivered you had some additional discussion with Mr. Marx? Is that correct?

THE WITNESS: Exactly.

THE COURT: We will let that part of it stand.

Q Without characterizing can you as best you can recall tell us what Mr. Marx said to you and what you said to Mr. Marx?

MR. FREDERICKS: When?

THE COURT: Preface your answer by identifying the time and the place of the discussion.

THE WITNESS: To the best of my recollection, sometime in June of 1966 a discussion took place as a result--

THE COURT: Where?

THE WITNESS: --in New York City, and I believe possibly in an office on Park Avenue that this occurred. I'm not sure about this. But we discussed my particular draft memorandum.

Q Can you tell us what was said in the dicussion about your draft?

A Yes. I indicated that this would be the understanding and about the extent of the offer that we would make for the acquisition of the Fugazy Travel Bureau and it would be on these terms.

Q When you say "this," to what are you referring?

A To this memorandum, H-1.

Q Whom did you say that to?

A I belive I said it to Mr. Marx at that point in time, and as a result--I was at that meeting with our attorney, Mr. Miller, of White & Case--

MR. FREDERICKS: I'm going to interrupt the witness. The answer is no longer responsive to the question.

THE COURT: That is correct, but I am going to let it stand. The jury has heard it.

In any event, you made the statements which you have testified about at that meeting. What, if anything, did Mr. Marx say?

THE WITNESS: Mr. Marx rejected the offer as we had put it in this memorandum as not being acceptable to him.

THE COURT: He said, "This is not acceptable"?

THE WITNESS: That is what he said.

Q Did you say anything that you can recall?

A Yes, I explained why, because we had negotiated for some period of time, so it seemed logical. I had prepared the memorandum in this fashion, for I felt on the types of business that both our companies were engaged in that this was as far as I was prepared to go in constructing a parallel traffic organization of this magnitude.

I did not feel that the concepts--

MR. FREDERICKS: Is he expressing--

A --I said that I had no faith in the franchise--

MR. FREDERICKS: I move to strike that, your Honor.

THE COURT: I will strike it.

MR. SANTORA: I would like to make an offer of proof in or out of the hearing of the jury.

THE COURT: Out of the hearing of the jury I will hear you.

Although you have not been in the jury box that long, I suggest we take a ten minute recess, and then we

Q Did the operations of Fugazy Travel generate sufficient revenues to pay the obligations of Fugazy Travel?

A The operations specifically of Fugazy Travel made a profit. The problems we had with a combination, and in order to answer your question I must divert a little -- a bit, and that is that we bought in the Fugazy Group approximately five other companies, which weren't profitable, and we disposed of those companies. Plus the fact we had an additional problem and that was that within 90 days after purchase we found that the fund that had been represented in the audited statement wasn't there, so we had to put money in and pay substantial interest charges on that.

Q You are saying that the money you were supposed to be getting from Tower, when you bought it from Tower wasn't there?

A That's right.

Q And how much short from the amount you thought was there did it turn out to be?

A It was sort of a dual problem. One was that cash was practically nil. The receivables were there, and the payables were there. So that when we started to pay our airline expenses, which had to be paid every ten days and sometimes in 15 days, there was no cash available.

So we had to put in money to the tune of over the couple of years of about $500,000.

Q You have used the term "The Fugazy Group". Mr. Marx, at the time you had these companies were they all operating under a parent company called Fugazy Travel?

A They were.

Q So, sir, when I speak of Fugazy Travel, so you will know I am speaking of the parent company and whatever it contains in the form of assets or subsidiaries or however, to refer to it as Fugazy Travel at that time.

Now, you say you put some money into Fugazy Travel. By 1967 do you know how much you had invested in Fugazy Travel?

A Something over $2 million.

Q And was it money that was put in, in the form of financing, used -- I think you mentioned to pay the airlines?

A That's one of the basic problems in all travel businesses.

Q And can you tell us what other areas that financing was used for, what other obligations were paid with the financing moneys?

A Interest. In one instance we had an arbitration on a contract which we inherited with a vice president, and that cost us $125,000. We obviously paid all the other

things that you do in a business. Some of that money was generated out of the business and some of the money was generated from the working capital.

Q Was some of the financing that you put in used for payroll, rent, operating expenses, things of that kind?

A Well, it wasn't segregated. It was just put in as working capital.

Q Is that how you referred to it then, as working capital?

A Correct.

Q Now, by 1967, I think you said youhad in about $2 million in Fugazy Travel.

A Slightly more.

Q And had you received back one cent of your investment from the time you started, in 1963?

A No, I had not.

Q Was that a cause for concern to you at that time, sir, that you had not received back one cent --

THE COURT: Sustained.

Q By 1967, Mr. Marx, were you trying to sell Fugazy Travel?

A No, I was not.

Q You intended to keep operating Fugazy Travel